In the Supreme Court of the United States

OCTOBER TERM, 1977

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SUPREME COURT, U.S.

No. 77-1327

LAKE COUNTRY ESTATES, INC., a corporation, COUNTRY CLUB ESTATES, a partnership, and BOULDIN DEVELOPMENT CORPORATION, a corporation,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, COUNTY OF EL DORADO, and STATE OF CALIFORNIA, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners, Lake Country Estates, Inc., Country Club Estates, and Bouldin Development Corporation, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 21, 1977. That judgment and opinion affirmed in part, reversed in part, vacated in part, and remanded a judgment and opinion entered by the United States District Court for the Eastern District of California dismissing petitioners' complaint.

OPINIONS BELOW

The opinion of the Court of Appeals of which petitioners seek review is reported at 566 F.2d 1353; a copy is appended

hereto as Appendix A. The order of the Court of Appeals denying petitioners' petition for rehearing is unreported; a copy is appended as Appendix B. A previous opinion of the Court of Appeals withdrawn upon rehearing was reported at 558 F.2d 928; a copy is appended as Appendix C. The District Court's opinion is unreported; a copy is appended as Appendix D.

JURISDICTION

The Court of Appeals' judgment was entered on December 21, 1977. A petition for rehearing was denied on January 30, 1978 (App. B). This petition is being filed within 90 days of both dates. This Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. This is an action against the Tahoe Regional Planning Agency ("TRPA"), an agency created by compact between California and Nevada approved by Congress. Under the compact, TRPA is a "separate legal entity" and "political subdivision" of the compacting states. Petitioners allege that TRPA has taken their property without just compensation and without due process of law. The Court of Appeals held that petitioners state a claim for relief under the Fifth Amendment. Nevertheless, the Court ruled *sua sponte* that TRPA is immune from suit under the Eleventh Amendment solely because it is an agency created by interstate compact. Neither the compacting states nor TRPA ever asserted that TRPA was immune under the Eleventh Amendment. There are presently over 175 interstate compacts creating more than 70 other administering boards, commissions and agencies; other compacts now under consideration would create a half dozen more.

Does the Eleventh Amendment provide immunity to all bi-state and multi-state agencies created by interstate compacts, as a class, without regard to the particular circumstances of their organization, powers, functions, financing, and other elements of their relationships with the participating states?

2. In making TRPA immune from suit, the Court of Appeals disregarded this Court's and other courts' decisions which have held that the Eleventh Amendment does not apply to counties and other political subdivisions of a state. By the express terms of the compact, TRPA is a "political subdivision" of the compacting states for the purpose of actions in the federal courts. Furthermore, most of TRPA's funds are paid and a majority of its members are appointed by local cities and counties, and the functions it performs, including the land use regulation at issue in this case, are traditionally local functions.

Does the Eleventh Amendment provide immunity to a political subdivision funded primarily by counties, governed by a body a majority of whose members are appointed by cities and counties, and performing traditionally local functions previously performed by those cities and counties merely because it is created by an interstate compact?

3. The Court of Appeals found that California and Nevada had not waived Eleventh Amendment immunity for TRPA by joining in the compact that created it. The compact provides that civil actions involving the agency are to be brought in the courts of the state where the affected property is situated "unless the action is brought in a federal court." For this purpose, it provides that TRPA is deemed a "political subdivision" of both states. Congress' consent to the compact provided that it should not "in any way affect the powers . . . of the

United States, or the applicability of any law or regulation of the United States . . . ."

Does an interstate compact that creates a bi-state agency, terms it a "political subdivision" of the states, refers to suits in the federal courts involving that agency, and provides that the compact in no way affects the powers of the United States waive any Eleventh Amendment immunity that otherwise might attach to the agency?

4. Petitioners allege that the members of the governing body of TRPA infringed petitioners' constitutional rights by taking their property without due process of law and without just compensation. Six of the ten members of the governing body are appointed by cities and counties within the Lake Tahoe Basin. The governors of California and Nevada each appoint one member. The other two members are state executive officials. The Court of Appeals held that these individuals are entitled to absolute immunity from liability to the extent they were acting in a "legislative" capacity.

Do appointed members of the governing body of a "political subdivision" have *absolute* immunity from any claim for damages for acts infringing constitutionally protected rights merely because those acts may be characterized as "legislative"?

STATUTES INVOLVED

The statutes involved are these:

1. Article I, § 10, cl. 3 of the Constitution of the United States, providing: "No state shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State . . . ."
2. The Eleventh Amendment to the Constitution of the United States, providing:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

3. The Tahoe Regional Planning Compact, California Government Code §§ 66800-66801 (West Supp. 1977); Nevada Revised Statutes §§ 277.190-277.230 (1973); Congressional consent granted, Act of December 18, 1969, Public Law No. 91-148, 83 Stat. 360. The text of the Compact, with additional consent provisions added by Congress, is contained in Pub. L. No. 91-148, set out verbatim in Appendix E.

STATEMENT OF THE CASE

In 1968 California and Nevada entered into a compact to create an agency to regulate and control development in the Lake Tahoe Basin, a geographic region that lies partly in each state. Cal. Gov't Code §§ 66800 *et seq.* (West Supp. 1977); Nev. Rev. Stat. §§ 277.190 *et seq.* (1973). Congressional consent was required before the Tahoe Regional Planning Compact ("the Compact") was effective, under Article I, § 10, cl. 3 of the United States Constitution, providing that "[n]o state shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State . . . ." Congress consented in December, 1969. Act of December 18, 1969, Pub. L. No. 91-148, 83 Stat. 360 (1969).

The Compact created the Tahoe Regional Planning Agency ("TRPA") as a "separate legal entity". (Compact, Art. III(a)). TRPA is deemed, for purposes of suit, to be a "political subdivision" of both states. (Compact, Art. VI(b)). TRPA is responsible, under the Compact, for adopting and implementing a regional plan providing for land use, transportation, conservation, recreation, public

services and facilities and similar subjects for the Lake Tahoe Basin. TRPA has a governing board of ten members, of whom none are elected. Six are appointed by county and city governments in the area; two are appointed, respectively, by the governors of California and Nevada; and two are members by virtue of their offices in resources agencies of the states.[1] Under the Compact, TRPA's funding also comes principally from the cities and counties in the Lake Tahoe Basin.[2]

Petitioners Lake Country Estates and Country Club Estates own certain parcels of real property within what is now TRPA's jurisdiction. Petitioner Bouldin Development Corporation is the beneficiary of a deed of trust on the Lake Country Estates property. Prior to the acts of the TRPA complained of in this action, the property had a fair market value of approximately $25,000,000.

In 1971, Lake Country Estates and Country Club Estates submitted plans for the development of their property to El Dorado County and to TRPA's Advisory Planning Commission. The plans were approved.

On February 10, 1972, however, TRPA adopted a "regional plan," consisting in part of a "Land Use Ordinance" ("LUO") and a "General Plan." Under the LUO petitioners' land was classified as "General Forest" and "Conservation Reserve." The LUO prohibited any development or use of the property for any purpose except hiking

1. The governing body also has a nonvoting member appointed by the President of the United States. Act of December 18, 1969, Pub. L. No. 91-148, § 3, 83 Stat. 360.

2. The counties within the region may be assessed up to a total of $150,000 by TRPA and are authorized to levy taxes to finance it. TRPA may also collect fees for services and accept gifts, donations, subventions, grants, and other financial aids and funds. Compact, Art. VII(a), (b), and (d).

trails, camps, riding trails, forest management programs, fire lookouts, and the like.

Petitioners applied to TRPA once again seeking permission to develop their property. TRPA arbitrarily and without cause rejected the application and reclassified all of petitioners' property as Conservation Reserve, effectively prohibiting development and any beneficial use of the property and destroying any value of the property. TRPA also announced its intention to acquire petitioners' property.

On April 16, 1973, petitioners Lake Country Estates and Country Club Estates filed a complaint in the United States District Court for the Eastern District of California, against TRPA, El Dorado County, the States of California and Nevada, and the members of TRPA's governing body and TRPA's executive officer (hereinafter referred to as "the individual defendants").[3] Petitioners alleged that the defendants had taken petitioners' property without just compensation and without due process of law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Similar claims were alleged under the Compact and the constitutions and laws of the States of Nevada and California. Petitioners sought damages and injunctive and declaratory relief. Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343,[4] as well as 28 U.S.C. § 2201 and the court's pendent jurisdiction.

3. The complaint was amended by stipulation to add Bouldin Development Corporation as a plaintiff on October 15, 1973.

4. The District Court had jurisdiction under 28 U.S.C. § 1331 because each plaintiff's claim exceeded $10,000, exclusive of interest and costs, and arose under federal constitutional provisions and the federal law of the Compact. It had jurisdiction under 28 U.S.C. § 1343 because plaintiffs asserted claims under 42 U.S.C. § 1983 for violations of constitutional rights under color of state law.

Defendants filed motions to dismiss this action and numerous other actions brought by other property owners asserting similar claims.[5] On December 11, 1975, the District Court dismissed all of the cases. Although it held that the complaints all "state facts sufficient for a cause of action in inverse condemnation," it ruled that "an inverse condemnation action could not be brought against" TRPA. It therefore granted TRPA's motion to dismiss without leave to amend. It dismissed claims against the individual defendants on the ground that "members of governmental bodies are immune from liability for damages arising out of their exercise of discretionary functions." It also dismissed all other defendants. Judgment was entered accordingly on December 16, 1975.

Petitioners appealed to the Ninth Circuit Court of Appeals, where the case was consolidated with others involving TRPA. In its first opinion issued on August 5, 1977, the Ninth Circuit reversed the District Court in part, holding that the complaint stated claims for damages and for injunctive and declaratory relief against TRPA under the due process clause of the Fifth Amendment.[6] (App. C, pp. 34-35) It affirmed dismissal of the states (but not TRPA) on the basis of the Eleventh Amendment and dismissal of the County on other grounds. (App. C, pp. 31-40) With respect to petitioners' damages claims against

5. A hearing on the motions was set for February 1, 1974, but was stayed by the District Court on its own motion pending a ruling by the Ninth Circuit Court of Appeals in *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, which the District Court had dismissed for lack of subject matter jurisdiction. Following the Ninth Circuit's reversal in *League to Save Lake Tahoe*, 507 F.2d 517 (9th Cir. 1974), and this Court's denial of certiorari, *cert. denied sub nom. Raley v. League to Save Lake Tahoe*, 420 U.S. 974 (1975), the District Court reset the motions in this case and in all other TRPA cases assigned to it for hearing on September 25, 1975.

6. The Court of Appeals held that petitioners stated no claim under the just compensation clause of the Fifth Amendment because TRPA did not have power to condemn the property. (App. C, p. 31)

the individual defendants, the court held that the individual defendants were entitled to "absolute" immunity to the extent they were acting in a "legislative" capacity and a qualified immunity to the extent they were acting in an "executive" capacity. (App. C, pp. 45-49)

TRPA petitioned for rehearing. On December 21, 1977, the Ninth Circuit Court of Appeals withdrew its August 5, 1977, opinion and issued a second opinion in its place.

In its second opinion the court ruled, for the first time and *sua sponte*, that TRPA is immune from suit under the Eleventh Amendment. (App. A, pp. 6-9) TRPA had never claimed such immunity at any stage. California and Nevada had vigorously denied that TRPA was an arm of either state or anything but a local governmental entity. (See App. F) The Court of Appeals itself had not suggested in its earlier opinion that TRPA was immune from suit. Nevertheless, the Court of Appeals held that TRPA was immune from suit on the basis of this Court's decision in *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), which it construed to hold that "bi-state compacts . . . preserve Eleventh Amendment immunity for entities created under them." (App. A, p. 8) It also stated that even if *Petty* were not a binding decision, it "would find immunity for the reasons set forth in the opinion of the Eighth Circuit. *Petty v. Tennessee-Missouri Bridge Comm'n*, 254 F.2d 857 (8th Cir. 1958)." (App. A, p. 8) The Ninth Circuit also held, in contrast to *Petty*, that California and Nevada had not waived immunity by entering into the Compact. (App. A, pp. 11-12) Accordingly, it dismissed TRPA as a defendant.

Thus the Ninth Circuit held that in federal court property owners whose property has been taken by an agency such

as TRPA can recover damages or other compensation for the taking only against the officials of the agency. None of the other defendants, the states, the counties, or the agency itself, is accountable in damages for the taking in any federal court. Moreover, property owners can recover from those officials only to the extent they acted in an "executive" capacity in taking the property, and only if they can be shown to have acted in bad faith or to have departed from evenhanded enforcement of the regulations they enacted. Otherwise, even those officials have an "absolute" immunity, and no one is liable for the taking of the property.

Petitioners filed a petition for rehearing. The court denied the petition on January 30, 1978.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Decision Presents Important Questions Concerning the Application of the Eleventh Amendment to Agencies Created by Interstate Compact.

The interstate compact is a widely used tool for meeting the increasingly complex and diverse needs of the states. As of December, 1977,[7] there were over 175 such compacts in effect, spanning a wide and growing range of governmental activity. Not a single state is party to fewer than a dozen. Forty-seven compacts were formed in the decade between 1961 and 1970. Some 20 proposals for new compacts are currently under consideration.

More than 70 of the compacts now in effect have created administering boards, commissions, and agencies. Compacts now under consideration would create half a dozen more.

7. The following discussion is based on and statistics are taken from Council of State Governments, *Interstate Compacts, 1783-1977 (A Revised Compilation)* (1977), and Council of State Governments, *Interstate Compacts, 1783-1970 (A Compilation)* (1971). *See also* Frankfurter & Landis, "The Compact Clause of the Constitution—A Study in Interstate Adjustments," 34 Yale L. J. 684, 735-748 (1925).

Their activities include conservation, corrections, health, labor conditions, nuclear energy, planning, pollution, publice safety, public welfare, and transportation. Some concern matters and geographical jurisdictions traditionally considered local, such as waterworks projects for Kansas City,[8] the development of the St. Louis metropolitan area,[9] and an interstate school district for Hanover, New Hampshire, and Norwich, Vermont.[10] Others exhibit regional concerns overlapping portions of two or more states, *e.g.*, bridges across the Delaware River between New Jersey and Pennsylvania,[11] and conservation of fishing resources in the tidewater portion of the Potomac River.[12] Still others affect whole regions of the country, *e.g.*, apportionment of the water of the Colorado River,[13] and water uses, economic development, and environmental quality in the Great Lakes area.[14] In short, agencies wielding power under the aegis of this "centaur of legislation,"[15] part state and part federal law, are a widely-used, powerful, and pervasive aspect of government in the United States.

The decision of the Court of Appeals below concerned the amenability of these institutions to suit in the federal

8. Act of September 22, 1922, ch. 431, 42 Stat. 1058 (1922).

9. Bi-State Development Agency Compact, Act of August 31, 1950, ch. 829, 64 Stat. 568.

10. New Hampshire-Vermont School District Compact, Act of November 13, 1963, Pub. L. No. 88-177, 77 Stat. 332.

11. Delaware River Joint Toll Bridge Compact, Act of August 30, 1935, ch. 833, 49 Stat. 1051, 1058.

12. Potomac River Compact of 1958, Act of October 10, 1962, Pub. L. No. 87-783, 76 Stat. 797.

13. Colorado River Compact, Act of December 21, 1928, ch. 42, 45 Stat. 1057.

14. Great Lakes Basin Compact, Act of July 24, 1968, Pub. L. No. 90-419, 82 Stat. 414.

15. Comment, Federal Question Jurisdiction to Interpret Interstate Compacts, 64 Geo. L.J. 87, 110 (1975).

courts under the Eleventh Amendment, and the amenability of their officers to such suits under doctrines of official immunity. Its decision in essence held that these agencies, transcending state boundaries and performing governmental functions of a varied nature, cannot be brought to account in the federal courts. That decision is wrong. It conflicts with the applicable decisions of this Court and with decisions of the Second and Eighth Circuits. See Sections I(B) and (C) below. It is also an important decision, presenting an issue that has a profound effect on the lives and activities of millions of persons and organizations and thousands of governments at all levels of the federal system. It is, however, an issue this Court has never addressed, having passed it over to decide on other grounds in the single case where it was presented. *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959). See Section I(A) below. Furthermore, the Ninth Circuit's ruling that the Eleventh Amendment has not been waived in this case conflicts with *Petty* on the one issue this Court did decide. See Section I(D) below.

A. THIS COURT HAS NEVER DECIDED WHETHER THE ELEVENTH AMENDMENT APPLIES TO AGENCIES CREATED BY INTERSTATE COMPACT.

Petty was a negligence suit under the Jones Act, 46 U.S.C. § 688, against a bi-state corporation, created by compact, that operated a bridge across the Mississippi River. The question presented to this Court was whether the Eleventh Amendment prevented the action from being prosecuted against the corporation in the federal courts. The majority opinion held that it did not because, assuming the Eleventh Amendment had any application to the bridge commission in the first place, the States had waived it upon entering into the compact. Three justices concurred on the express understanding that the Court did not reach

the question of the applicability of the Eleventh Amendment to agencies created by interstate compacts. Three dissenting justices construed the majority opinion as "acknowledging the applicability of the Eleventh Amendment to the Tennessee-Missouri Bridge Commission . . . ." 359 U.S. at 283. The majority opinion, however, written by Justice Douglas, did not decide that question, nor indeed did it discuss it. Instead it "assume[d] *arguendo* that this suit must be considered as one against the states since this bistate corporation is a joint or common agency of Tennessee and Missouri," 359 U.S. at 279, and phrased the decisive question as "whether Tennessee and Missouri have waived their immunity under the facts of this case." 359 U.S. at 277. Finding that they had, the majority opinion did not reach the applicability issue.

Nevertheless, the Court of Appeals in this case read *Petty* as deciding that the Eleventh Amendment applies to all bi-state and multi-state agencies created under the compact clause, absent a waiver by the compacting states of the immunity it provides. Conceding that the three concurring justices had expressly reserved that question, it nevertheless believed the majority opinion had answered the question *sub silentio*, in spite of the clear statement in the opinion that that answer was merely assumed for the sake of argument. Adding the three justices of the majority opinion to the three dissenters,[16] the Court of Appeals found a six-justice majority in support of the proposition that every bi-state or multi-state agency is entitled to Eleventh Amendment protection. (See App. A, pp. 7-8)

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16. The Court of Appeals ignored the fact that the dissenting opinion referred only to the applicability of the Amendment "to the Tennessee-Missouri Bridge Commission," not to bi-state agencies as a class.

Such a reading of *Petty* is clearly wrong.[17] Nevertheless even assuming *arguendo* that this Court's opinion is sufficiently ambiguous to allow the Court of Appeals' construction, the question is one this Court should now authoritatively settle. In the 19 years since *Petty,* Congress has consented to more than 25 additional compacts, most of them creating agencies to administer their provisions; in addition, a number of other compacts have been proposed and are under consideration. Given the broad sweep of their functions and the numbers of persons affected by their operations, the status of these agencies under the Eleventh Amendment should not continue to be governed by a decision of this Court in which the issue was not addressed, was decided *sub silentio,* if at all, and was, after all, unnecessary to the decision of the case.

Because this Court has never settled whether a multistate agency can be immune from suit under the Eleventh Amendment, it has never indicated whether the lower courts in reaching an answer to that question should consider the same sorts of factors that are used in determining the Eleventh Amendment status of intrastate agencies. This question was presented in *Petty,* but because the Court did not reach the issue of the applicability of the Eleventh Amendment, it gave no indication of an answer. The question is one of vital importance to TRPA, against

17. Petitioners are not alone in reading *Petty* differently from the Court of Appeals. See *Byram River v. Village of Port Chester, New York,* 394 F. Supp. 618 (S.D.N.Y. 1975). There Judge Knapp, in deciding whether the Interstate Sanitation Commission, created by compact between New York, New Jersey, and Connecticut, was immune from suit under the Eleventh Amendment, stated that "the Supreme Court has never addressed itself to . . . whether multi-state agencies in general have Eleventh Amendment protection . . . . [In *Petty*] the Court specifically avoided the issue." 394 F. Supp. at 626. Judge Knapp, after analyzing the relationship of the Commission to New York, held that it was not entitled to Eleventh Amendment protection.

which numerous other suits are now pending in the district courts and the Ninth Circuit Court of Appeals. It is equally important to many similar agencies created by compact that are now involved in and may anticipate litigation. Finally, it is also important to the states and to Congress in creating such interstate agencies. It is a question this Court should decide.—

B. THE COURT OF APPEALS' DECISION APPLYING THE ELEVENTH AMENDMENT TO ALL INTERSTATE AGENCIES AS A CLASS CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT AND WITH DECISIONS OF THE SECOND AND EIGHTH CIRCUITS.

This Court's review of the Court of Appeals' decision is all the more imperative because the decision below conflicts with applicable decisions of this Court, including *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1977); with that of the Second Circuit in *Trotman v. Palisades Interstate Park Commission,* 557 F.2d 35 (2d Cir. May 27, 1977); and with that of the Eighth Circuit in *Petty v. Tennessee-Missouri Bridge Commission,* 254 F.2d 857 (8th Cir. 1958), *reversed on other grounds,* 359 U.S. 275 (1959).

The Court of Appeals here held that the Eleventh Amendment applies uniformly to all actions in federal court against multi-state agencies created by compact, relying on its incorrect reading of *Petty, supra.* (See App. A, pp. 7-8) In doing so, it went much further than even the dissenting justices in *Petty,* who read the majority opinion only as "acknowledging the applicability of the provisions of the Eleventh Amendment *to the Tennessee-Missouri Bridge Commission.* . . ." (emphasis added) 359 U.S. at 283. It ignored the implication of that statement that the question is one to be decided in reference to the particular agency, as the Eighth Circuit did in the *Petty* case and the Second Circuit did in *Trotman,* both discussed

below. It also disregarded a body of law developed by this Court employed in deciding on a case-by-case basis whether particular actions against state agencies and their officers are actually actions against the state barred by the Eleventh Amendment.

Not every element of state government is entitled to Eleventh Amendment protection. It is well established that counties, municipal corporations, and other political subdivisions of a state do not enjoy the immunity it provides. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977); *Moor v. County of Alameda*, 411 U.S. 693, 717-21 (1973); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890); see *Edelman v. Jordan*, 415 U.S. 651, 667, n. 12 (1974). In *Mt. Healthy* this Court decided whether it applied to a local school board. In considering this question, it found

> "The issue here . . . turns on whether the [agency] is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation *or other political subdivision* to which the Eleventh Amendment does not extend. The answer depends, at least in part, upon the nature of the entity created by state law." (emphasis supplied) 429 U.S. at 280.

It therefore looked to Ohio statutes providing that school districts are "political subdivisions" and to the board's power to issue bonds and levy taxes as a source of financing independent of the state treasury. Although the board was "subject to some guidance from the State Board of Education" and received "a significant amount of money from the State," this Court concluded that the school board was "more like a county or city than it is like an arm of the state," and accordingly refused it Eleventh Amendment immunity. 429 U.S. at 280.

The Eleventh Amendment analysis used by this Court in *Mt. Healthy* applies with equal force to an agency such as TRPA created by interstate compact. The Eighth Circuit clearly applied such an analytic approach in its decision in *Petty*. The Second Circuit has also done so in its opinion in *Trotman v. Palisades Interstate Park Commission, supra*. See pp. 18-19 below.

The Ninth Circuit stands in conflict with this Court and those Circuits in immunizing an entire category of agencies from suit.[18] It refused in this case to apply a similar analysis to TRPA, even though the Compact expressly provides that TRPA is a "separate legal entity" and is to be deemed a "political subdivision" for purposes of suit, in a paragraph of the Compact that expressly mentions suit in the federal courts. Indeed, the sole consideration of the specific status of the TRPA by the Ninth Circuit was a token reference to the decision of the Eighth Circuit in *Petty*, which

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18. A strong argument can be made that the Eleventh Amendment should not apply to any multi-state agency created by compact. It is one thing to say that disputes of a citizen with an agency created by a single state should be decided in that state's courts, not the federal courts. It is quite another to say that when a state combines with one or more other states to create such an agency, which exercises power beyond its borders and requires the consent of Congress, a dispute with the agency is still a matter for the state courts. It is not. It is a federal matter governed by the federal law of the compact, as the Ninth Circuit recognized in this case. See App. A, p. 14. To apply the Eleventh Amendment to a multi-state agency, as the Ninth Circuit did, is to relegate suits against that agency to the state courts. That requires the courts of one state to enter rulings and judgments against an agency that by hypothesis is an arm of at least one other sovereign state and perhaps several other states. Such functions are far more appropriately performed by a federal court.

These considerations were perhaps what the concurring justices in *Petty* had in mind in reserving the applicability issue, for it appears from the language they employed that the question they declined to decide was not whether the Eleventh Amendment applies to all bi-state agencies, but whether it applies to any of them.

dealt with an entirely different sort of agency and does not support the Ninth Circuit's decision. See p. 22 below.

In *Petty*, the Eighth Circuit faced "the question whether the [Tennessee-Missouri Bridge] Commission is an entity separate and apart from the States of Tennessee and Missouri" and was therefore immune from suit under the Eleventh Amendment. 254 F.2d at 859. In deciding this question, the Court considered the state character of the functions the commission was found to perform; its control by the governors of the compacting states; the fact that the bridge it built was to belong to the states when paid for; the commission's sources of financing; and the effect of a judgment against it on the governmental operations of the states. Because it found on the basis of this analysis that the commission was "an instrumentality of both Tennessee and Missouri and . . . not an entity separate and distinct from the States," it held the Eleventh Amendment applicable. 254 F.2d at 860.

The Second Circuit in *Trotman* took a similar analytic approach in deciding "whether the Eleventh Amendment immunity of the states from federal suit may be invoked by the [Palisades Interstate Park] Commission," a bi-state agency created by compact between New York and New Jersey. 557 F.2d at 38. It cited and acknowledged a passage from its earlier decision in *Fitzpatrick v. Bitzer*, 519 F.2d 559 (2d Cir. 1975), *reversed in part on other grounds*, 427 U.S. 445 (1976). There, ruling on the Eleventh Amendment's applicability to the Connecticut State Retirement Fund, it had stated:

> "In determining whether a separate state agency or institution shares the Eleventh Amendment shield as an 'alter ego' of the state, a court must look to numerous factors, no one of which is conclusive [citations]. The most important, of course, is whether, in the event plaintiff prevails, judgment will have to be paid out of the state treasury. [Citations] Also to be considered is whether the entity sued is performing a governmental or proprietary function, whether it has the power to sue and be sued and enter into contracts, the degree of autonomy over its operations, and whether the state has immunized itself from responsibility for the agency's operations. [Citations]" 519 F.2d at 564-65.

After discussing some of these factors as they applied to the commission, the *Trotman* court found it immune under the Eleventh Amendment because

> " . . . an analysis of all the pertinent factors as set out in the compact and applicable New York laws leads us to the inevitable conclusion that in reality this suit against the Commission is one against the State of New York." 557 F.2d at 38.[19]

19. In the course of its discussion the Court noted, without comment, *Byram River v. Village of Port Chester, New York*, 394 F. Supp. 618 (S.D.N.Y. 1975), where that Court's analysis had resulted in no Eleventh Amendment immunity for a tri-state agency created by compact. See also *United States Steel Corporation v. Multistate Tax Commission*, 367 F. Supp. 107 (S.D.N.Y. 1973), where the court, ruling on a motion to dismiss denied Eleventh Amendment immunity to the Commission, created by agreement of 17 adopting states (at that time), on the ground that the compact had not been consented to by Congress and its validity was therefore at issue. It continued in dictum:

> "Even if there were no question of the constitutional validity of the Commission, the mere fact that an agency is a valid state agency would not automatically entitled it to eleventh amendment immunity as a matter of law. In each case, the facts must be closely scrutinized to determine whether the agency in question is, in effect, an arm or alter ego of the state so as to entitle it to immunity." 367 F. Supp. at 113 (citations omitted).

A three-judge district court later decided that no Congressional consent was required, 417 F. Supp. 795 (S.D.N.Y. 1976), *affirmed*, — U.S. —, 46 U.S.L.W. 4115 (February 21, 1978).

The error of the Ninth Circuit's simplistic approach and the contrasting validity of the analytical approach employed by the Second and Eighth Circuits is highlighted by one of the interstate compacts referred to earlier, the New Hampshire-Vermont School District Compact, consented to by Congress in 1963. Pub. L. 88-177, 77 Stat. 332 (1963). That compact authorizes creation of an interstate school district for Hanover, New Hampshire, and Norwich, Vermont. If the Ninth Circuit's opinion is correct, that district is absolutely immune from suit in the federal courts as a result of the compact (which contains no provisions that could be construed as a *Petty* waiver). Neighboring districts performing precisely the same functions, however, are presumably subject to federal suit under the teachings of *Mt. Healthy*. There is no justification for such a disparity of treatment, where the sole difference between such districts is that some are created by one state acting alone while others are created by two states acting together.

C. UNDER THE APPLICABLE STANDARDS, THE COURT OF APPEALS ERRED IN GRANTING THE TRPA IMMUNITY.

It is also clear here that under the proper analysis of the status of TRPA required by *Mt. Healthy*, *Petty* and *Trotman*, *supra*, TRPA is not entitled to Eleventh Amendment immunity. The Compact expressly establishes that TRPA is a "separate legal entity." (Compact, Art. III(a)). In addition, TRPA is deemed a "political subdivision" of the compacting states[20] for the purpose of suits in the federal courts:

> "Each [civil] action [to which TRPA is a party] shall be brought in a court of the state . . . where the property affected . . . is situated, *unless the action is brought in a federal court*. For this purpose, the agency shall be deemed a *political subdivision* of both the State of California and the State of Nevada." (emphasis supplied) (Compact, Art. VI(b)).

20. *Cf. Mt. Healthy*, 429 U.S. at 280: "Under Ohio Law the 'state' does not include 'political subdivisions' and 'political subdivisions' do include local school districts."

Thus, the Compact itself answers the question whether TRPA is to be treated as "a municipal corporation or other political subdivision" (429 U.S. at 280) which is not immune from suit. It expressly provides that it is to be so treated.

The Compact's other provisions confirm that TRPA is not an arm of the states. The functions TRPA performs including the land use regulation at issue here are ones traditionally performed by local government. A majority of the members of the governing body (six of ten voting members) are appointed by *counties and cities* rather than the states (Compact, Art. III(a)); ten of the 17 members of the Advisory Planning Commission specified in the Compact are also associated with local agencies, and four others are to be residents of the region, while only one is from state government (Compact, Art. III(h)). The Compact also provides that TRPA's funding is to be paid by the counties rather than the states.[21] (Compact, Art. III(a)). Indeed, the Compact expressly insulates the states from liability, providing that "[n]o obligation contracted by the Agency shall bind either of the party states or any political subdivision thereof." (Compact, Art. VII (f)).

Both the compacting states, moreover, have vigorously contended in this and related litigation that TRPA is not an arm of either state. As the State of California put it,

21. TRPA may also collect fees for services rendered and is authorized to accept gifts, donations, subventions, grants, and other financial aid and funds. (Compact, Art. VII(b) and (d)).

TRPA is "no more a California State agency than are the City of Los Angeles or the County of Placer. . . . [I]t is separate and distinct from the state, rather than being one of its arms. . . ." Nevada has taken the same position. See Appendix F. Even TRPA itself has not asserted that it is entitled to Eleventh Amendment immunity.

These factors all distinguish this case from the one the Eighth Circuit decided in *Petty*. The court there concluded that the bridge commission performed a state governmental function, providing bridges and highways. In contrast, TRPA performs traditionally local governmental functions. In *Petty*, the bi-state agency was governed by a body consisting entirely of appointees of the compacting states' governors, and its actions were subject to veto by the governors. TRPA, on the other hand, is governed by a body the majority of whose members are appointed by *local* governments. (Compact, Art. III(a)). Aside from bridge tolls, which were pledged for operating expenses and bond retirement, the bridge commission's only sources of operating revenues were the states and the federal government. (In *Trotman*, too, the commission's only revenues, aside from gifts, were appropriations by the legislatures and use fees, which were required to be turned over to the state treasury.) TRPA, however, is financed chiefly by the *counties*. (Compact, Art. III(a)).[22] Execution on a judgment against the commission, according to the Eighth Circuit, would have been on the bridge it operated, which was to belong to the states when bonded indebtedness was paid. No such factor is present here. The bridge commission was found by the court not to be

22. Even if TRPA received "a significant amount of money from the State," that would not be determinative. See *Mt. Healthy, supra*, 429 U.S. at 280.

"an entity separate and distinct from the States," 254 F.2d at 860. TRPA is expressly made a "separate legal entity," Compact, Art. III(a), and none of its obligations bind the states, Compact, Art. VII(f). In short, there is simply no operative similarity between the facts of the *Petty* case and the facts here, on which the Court of Appeals could have relied in its opinion below.

D. THE COURT OF APPEALS ALSO ERRED IN DECIDING THAT THE ELEVENTH AMENDMENT WAS NOT WAIVED.

The Court of Appeals' decision below also conflicts with this Court's decision in *Petty* on the question of waiver. In *Petty*, this Court found waiver in a clause in the compact authorizing the bridge commission "to sue and be sued in its own name". The Ninth Circuit found no waiver here although the Compact contains similar provisions authorizing suit and *expressly mentioning the federal courts*. Compact, Art. VI(b), *supra*. In *Petty*, this Court also relied on a clause in the Congressional consent providing that nothing in the compact should "be construed to affect, impair, or diminish any right, power, or jurisdiction of the United States or of any court, department, board, bureau, officer, or official of the United States. . . ." 359 U.S. at 277. The Ninth Circuit found no waiver here although the congressional consent contains a similar provision that nothing in the Act or Compact should "in any way affect the powers, rights, or obligations of the United States, or the applicability of any law or regulation of the United States in, over, or to the region. . . ." Pub. L. No. 91-148, § 3, 83 Stat. 360 (1969). The "powers of the United States" presumably include the judicial power; similarly, "the applicability of any law" presumably includes both constitutional provisions and the jurisdictional statutes for the federal courts. The opinion of the Court of Appeals below,

however, disregarded this provision of Congress' consent to the Compact. See App. A, pp. 11-12

These provisions bearing on waiver must also be construed in light of other provisions of the Compact, discussed above, indicating that the party states and Congress did not believe that the Eleventh Amendment would apply to TRPA in the first place. At the very least, these provisions must be construed as indicating an intention to waive any immunity that does attach to TRPA. Any other result renders meaningless the Compact's reference to suits in the federal courts. See *Edelman v. Jordan, supra,* 415 U.S. at 673: ". . . we will find waiver only where stated 'by the most express language *or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction*'" (emphasis supplied). These provisions must also be seen in light of the states' position that TRPA is not an arm of either state and TRPA's own failure to assert the Eleventh Amendment in any of the courts below, indicating that the agency itself never believed it had such immunity.

Finally, the Ninth Circuit's ruling entirely disregards the fact that these waiver provisions appear in an interstate compact approved by Congress. It should not be lightly inferred that Congress intended that suits against a multistate agency like TRPA should have to be brought in the state courts. That would lead to the anomaly of courts of one state adjudicating claims against an agency which is at least in part the agency of another state.[23] There is no indication that Congress and the compacting states intended such a result; in fact all indications, including the express terms of the Compact, are to the contrary.

• • •

23. See note 17, *supra.*

In summary, the result reached in the opinion below is in unresolvable conflict with applicable decisions of this Court, that of the Eighth Circuit in *Petty,* and that of the Second Circuit in *Trotman,* as well as with two decisions of the district courts in the Second Circuit. It differs from those decisions both in the test to be applied in reaching a decision on the applicability of the Eleventh Amendment to interstate agencies and in the result clearly indicated when the proper standard is applied in the context of this case. It also conflicts with this Court's decision in *Petty* on the issue of waiver. The decision should therefore be reviewed in this Court.

II. The Decision Below, Granting Absolute Immunity to the Members of TRPA's Governing Body, Is Unprecedented in the Decisions of This Court and In Conflict With Decisions of Other Circuits.

The Court of Appeals ruled below that the members of TRPA's governing body are absolutely immune from suit to the extent their challenged acts were performed in a "legislative" capacity.[24] It characterized TRPA as a "regional legislature", created by California and Nevada because "the legislatures of either state could not deal effectively with problems that demand the consideration of a body which can weigh regional interests and wisdom." (App. A, p. 19) Referring to this Court's decisions granting members of Congress and state legislatures absolute immunity, *Doe v. McMillan,* 412 U.S. 306 (1973); *Tenney v. Brandhove,* 341 U.S. 367 (1951), it "discern[ed] no reason why these 'regional legislators' should not be accorded the

24. The Court of Appeals agreed that TRPA's members are entitled to only a qualified immunity to the extent they were acting in an "executive" capacity.

same immunity as their state and national counterparts." (See App. A, pp. 18-19)

There are, however, substantial reasons why TRPA's members are not entitled to absolute immunity. TRPA's only resemblance to a state legislature is that it makes rules. Unlike a state legislature, it also has "executive" enforcement powers. (Compact, Art. VI(b)). Unlike a state legislature, it is not an elective body (Compact, Art. III(a)), and it exercises no plenary powers. (See Compact, Art. V and VI). It is, in short, an appointed administrative body, like many thousands of other administrative bodies and executive officials at all levels of government that exercise tiny segments of delegated rulemaking authority over specific subject matters in limited geographic areas.

The Ninth Circuit's extension of absolute immunity to the members of such an administrative body is unprecedented in the decisions of this Court. While this Court has found absolute immunity appropriate for state and federal legislators, *Doe v. McMillan, supra; Tenney v. Brandhove, supra,* and for judicial officers, *Imbler v. Pachtman,* 424 U.S. 409 (1976); *Pierson v. Ray,* 386 U.S. 547 (1967), it has refused it to a state's highest executive officer, *Scheuer v. Rhodes,* 416 U.S. 232 (1974). It has never extended absolute immunity to officials of subordinate state agencies or political subdivisions such as TRPA, limiting such officials to a qualified immunity. *Procunier v. Navarette,* — U.S. —, 46 U.S.L.W. 4144 (February 22, 1978); *O'Connor v. Donaldson,* 422 U.S. 563 (1975); *Wood v. Strickland,* 420 U.S. 308 (1975).

In *Wood v. Strickland, supra,* this Court denied absolute immunity to the members of an elected local school board. Although acknowledging that "school board members function at different times in the nature of legislators and adjudicators" (420 U.S. at 319), it permitted them only a qualified immunity in administering discipline to a student, where presumably they acted in their judicial role. Nothing distinguishes TRPA members functioning "legislatively" from school board members functioning "judicially." Neither should be absolutely immune. Both should be entitled to the same qualified immunity which this Court carefully defined in *Wood.*

The Court of Appeals' decision is also in conflict with decisions of the First, Fifth, Sixth, Seventh, and Eighth Circuits, which have given members of other comparable bodies only qualified immunity. *Williams v. Anderson,* 562 F.2d 1081 (8th Cir. August 31, 1977) (school board); *Hostrop v. Board of Junior College District No. 515,* 523 F.2d 569 (7th Cir. 1975), *cert. denied,* 425 U.S. 963 (1976) (junior college board); *Jones v. Diamond,* 519 F.2d 1090 (5th Cir. 1975) (county supervisors); *Roberts v. Williams,* 456 F.2d 819 (5th Cir.), *cert. denied,* 404 U.S. 866 (1971) (county supervisors); *Lynch v. Johnson,* 420 F.2d 818 (6th Cir. 1970) (presiding officer of "county fiscal court," a Kentucky legislative and administrative body); *Nelson v. Knox,* 256 F.2d 312 (6th Cir. 1958) (city commissioners); *Cobb v. City of Malden,* 202 F.2d 701 (1st Cir. 1953) (Magruder, C.J., concurring) (city council members). Even the Ninth Circuit has previously recognized that these bodies differ from federal and state legislatures, for in *Thomas v. Younglove,* 545 F.2d 1171 (9th Cir. 1976), it stated:

> "The absolute legislative immunity recognized in *Tenney v. Brandhove,* 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), applied in that case to state legislators and not necessarily to those other state or local officials whose duties can be characterized as partially 'legislative'."

Justice Stewart, then a judge on the Sixth Circuit, summed it up twenty years ago in *Nelson v. Knox, supra:*

> "In the light of the relevant federal decisions, we cannot agree that members of a municipal legislative body share the complete immunity from liability which is enjoyed by judges and state legislators. . . .
>
> "It is our opinion that the defendants in this case were not clothed with complete immunity but enjoyed instead a qualified privilege." 256 F.2d at 314-15.

The Court of Appeal's decision granting the members of TRPA absolute immunity cannot be reconciled with these decisions.

Traditional historical concern for the parliamentary freedom of an elected representative body from interference by the executive and the judiciary justifies absolute immunity for members of Congress and state legislatures. See *Tenney v. Brandhove, supra,* 341 U.S. at 372-76. TRPA's activities, however, raise no more of these concerns than do the activities of hundreds of other state regulatory agencies and political subdivisions. Its case, in fact, is similar to, although weaker than, that of city councils, county boards of supervisors, and local school boards given only qualified immunity in the decisions of other Circuits, for it is very much like them. It is made up chiefly of local officials, is financed by local governments, and exercises its limited rulemaking powers in a localized area. See pp. 20-21, above. If TRPA is a "regional legislature," then these boards and councils are "local legislatures" entitled to the same absolute protection. The only thing that distinguishes them from TRPA in this regard is that their members are at least elected, while TRPA's are appointed.

Under the decisions of this Court and of other Circuits, the liability of all these officials should be governed by the

same rule of qualified immunity. Because the Ninth Circuit's decision is inconsistent with those decisions and raises significant questions concerning the immunity available to administrative officials, it should be reviewed in this Court.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Dated: March 20, 1978

Respectfully submitted,

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Appendix A

Court of Appeals' Decision

NATHAN S. JACOBSON,

Plaintiff-Appellant,

v.

TAHOE REGIONAL PLANNING AGENCY, a political subdivision of the States of Nevada and California, the State of Nevada, and the County of Washoe,

Defendants-Appellees.

MELVIN F. JONES, Verona M. Jones, his wife, Leo D. Wyrsch, Cora E. Wyrsch, his wife, Paul W. Gould, Lola E. Gould, his wife, Joseph Trinchero, Delores G. Trinchero, his wife, Paul Williams and Lanai Corporation, a California Corporation,

Plaintiffs-Appellants,

v.

TAHOE REGIONAL PLANNING AGENCY (T.R.P.A.), a political subdivision of the States of Nevada and California, California Tahoe Regional Planning Agency, the State of California, Placer County and Eldorado County,

Defendants-Appellees.

LAKE COUNTRY ESTATES, INC., a corporation, and Country Club Estates, a partnership,

Plaintiffs-Appellants,

v.

TAHOE REGIONAL PLANNING AGENCY, County of El Dorado, and State of California, et al.,

Defendants-Appellees.

LAYTON-TAHOE PROPERTIES,

Plaintiff-Appellant,

v.

TAHOE REGIONAL PLANNING AGENCY, State of California, State of Nevada, County of Placer, and United States of America,

Defendants-Appellees.

Nos. 75-2400, 76-1182, 76-1289 and 76-1608.
United States Court of Appeals, Ninth Circuit.
Dec. 21, 1977.

Appeals from the United States District Court for the Eastern District of California.

Appeal from the United States District Court for the District of Nevada.

Before WRIGHT, GOODWIN, and ANDERSON, Circuit Judges.

EUGENE A. WRIGHT, Circuit Judge:

I.

THE TAHOE REGIONAL PLANNING COMPACT

Some background information is necessary for an understanding of this opinion. In 1968, California and Nevada entered into a compact to create a regional agency with power to regulate and control development within the Lake Tahoe Basin. Cal. Gov't Code § 66800 *et seq.* (West Supp. 1974); Nev.Rev.Stat. § 277.190 *et seq.* (1973). Congress consented to the Tahoe Regional Planning Compact (hereinafter "the Compact") in December 1969.[1] Pub.Law 91-148, 83 Stat. 360 (1969).

The governing body of the Tahoe Regional Planning Authority (hereinafter "the TRPA") was charged with adopting ordinances, rules, regulations and policies to effectuate a regional plan setting minimum standards for water purity, zoning, shoreline development and the like.[2] The TRPA enacted a comprehensive Land Use Ordinance which limited the permitted uses of certain lands within the Basin, including those owned by appellants.

Land belonging to appellants and previously zoned as residential, multiple residential, or commercial was rezoned

1. Article I, § 10, cl. 3, of the United States Constitution provides in part:
   "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . ."
2. Compact, Art. VI(a).

as "General Forest District,"[3] "Recreation District,"[4] and "Conservation Reserve."[5] Generally, the ordinance allowed very limited residential use, and no tourist residential or commercial use, of the rezoned land. Other permitted uses included hiking trails, campgrounds, stables, recreation camps, skiing facilities, timber growing, livestock grazing and electrical substations. In addition, outdoor recreation concessions and educational facilities were allowed in the "Recreation District."

Appellants complain that the land use ordinance constituted an inverse condemnation, or a "taking," of their property. Basing their claims on the Fifth and Fourteenth Amendments to the United States Constitution and on the just compensation clauses of the constitutions of California and Nevada, they sought injunctive, declaratory and monetary relief against a variety of defendants, including the TRPA, its executive director and members of its governing board, several counties in the Lake Tahoe Basin, the states of California and Nevada, and the United States.

The district courts dismissed the suits for a variety of reasons. On appeal we rendered an opinion on August 5, 1977. On petition for rehearing, and responses thereto, we withdraw our opinion of August 5th, and issue the following opinion in its place. The petition for rehearing is otherwise denied.

II.

THE CAUSES OF ACTION

Before we can ascertain whether appellants' complaints should have withstood the motions to dismiss below, we

3. TRPA Ordinance No. 4, § 7.20.
4. *Id.* at § 7.30.
5. *Id.* at § 7.110.

must determine under what theories appellants might have proceeded to trial. First, we consider the causes of action grounded on the just compensation provisions of the constitutions of California and Nevada.

By consenting to the Compact, Congress transformed the contract between the two states into federal law. *League to Save Lake Tahoe v. TRPA*, 507 F.2d 517, 523 & n. 13 (9th Cir. 1974), *cert. denied*, 420 U.S. 974, 95 S.Ct. 1398, 43 L.Ed.2d 654 (1975). Although the TRPA must be considered an agency of the contracting states, it operates under the aegis of federal law. Consequently, causes of action based on the state constitutional provisions must fail because the Compact, as federal law, preempts state law.

Appellants also challenged the TRPA's ordinance under the due process clause of the Fourteenth Amendment to the United States Constitution, alleging arbitrary and oppressive state action. We think that a cause of action rooted in the Fourteenth Amendment may be appropriate since the TRPA is, in effect, an agency of the contracting states.[6] It would be unreasonable to allow states to avoid the constraints imposed by the Fourteenth Amendment simply by joining forces with each other. Such an aggregation of state power makes the need for those constraints even more pressing.

Finally, appellants challenge appellees' actions under the due process and just compensation clauses of the Fifth Amendment. Since the Compact is federal law, *League to Save Lake Tahoe v. TRPA, supra*, resort to the Fifth Amendment as well is proper.

We find, however, that a cause of action for inverse condemnation under the just compensation clause cannot be stated against the TRPA, its executive director or members

6. See *infra*, p. [7].

of its governing board because they lack condemnation authority.[7]

Appellants do allege facts sufficient to support a claim under the due process clause.[8] As the Supreme Court has stated:

> Due process of law in the [Fifth Amendment] refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law.

Hurtado v. California, 110 U.S. 516, 535, 4 S.Ct. 111, 120, 28 L.Ed. 232 (1884). The Compact is a "law of the land," deriving its authority from powers conferred upon Congress by the Constitution. The due process clause was intended to protect the liberty and property interests of individuals from invasion by the arbitrary and oppressive exercise of power by the federal government. Since appellants allege such an invasion of their property interests,

7. TRPA was given only the power to regulate, not the power to condemn. The statutory grant of the power of eminent domain must be indicated by express terms or by clear implication. *Western Union Tel. Co. v. Penn. R. R.*, 195 U.S. 540, 569, 25 S.Ct. 133, 49 L.Ed 312 (1904). *See also Hudson Water Co. v. McCarter*, 209 U.S. 349, 355, 28 S.Ct. 529, 52 L.Ed. 828 (1908); *Atlantic Coast Line R. Co. v. North Carolina Corp. Comm'n*, 206 U.S. 1, 20, 27 S.Ct. 585, 51 L.Ed. 933 (1907). The delegation of police power to TRPA was neither an express grant of condemnation power nor one by implication.

8. It is not inconsistent to find that both the Fourteenth and Fifth Amendments can support a cause of action against the same defendants. As noted, this case concerns a bi-state compact, that "centaur of legislation" which is an offspring of both state and federal law. *See* Comment, "Federal Question Jurisdiction to Interpret Interstate Compacts," 64 Geo.L.J. 87, 110 (1975). The two causes of action, however, substantially overlap.

they have stated a cause of action under the Fifth Amendment.[9]

III.

LIABILITY OF THE TRPA

We turn now to the liability of the TRPA, the only defendant against whom the district courts did not dismiss the suits.

The Compact evidences a delegation to a separate legal entity of authority ordinarily residing in each of the two

9. Under the strict standard of pleading called for by *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 56 S.Ct. 159, 80 L.Ed. 138 (1935), none of the complaints in any of the cases on appeal would withstand a motion to dismiss. They lack specific factual allegations which, if proved, would rebut the presumption of constitutionality that the *Pacific States* Court accorded acts of administrative and legislative bodies.

Although *Pacific States* has never been explicitly overruled, we do not believe that it represents the present state of the law because it was decided two years before the promulgation of the Federal Rules of Civil Procedure. We find no precedent in the Ninth Circuit applying *Pacific States* to an analogous case since the Rules took effect.

In *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), the Supreme Court explained the modern philosophy of pleading:

> "[A]ll the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."

Id. at 47-8, 78 S.Ct. at 103 (citations omitted).

Thus a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. 2A Moore's Federal Practice ¶ 12.08 (1975).

The allegations of "taking," even though phrased in terms of inverse condemnation, are sufficient to show that appellants complained that the TRPA exercised its police powers improperly, and that they relied on the due process clauses of the Fifth and Fourteenth Amendments.

states. With Congress' constitutionally required approval, the TRPA exercises a species of state authority. In effect, the bi-state Authority serves as an agency of the participant states, exercising a specially aggregated slice of state power.[10] As such, it would appear that the TRPA is protected by sovereign immunity, preserved for the states by the Eleventh Amendment.

The Supreme Court indicated as much in *Petty v. Tennessee-Missouri Bridge Com'n*, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959). Although the defendant was a bi-state corporation created by compact, Justice Douglas, writing for three Justices in the majority, phrased the issue in a telling manner: "The question here is whether *Tennessee* and *Missouri* have waived their immunity under the facts of this case." 359 U.S. at 277, 79 S.Ct. at 787 (emphasis added). The Court allowed the suit to lie against the *bi-state corporation* because it found that the constituent states had expressly waived *their* immunity.

Admittedly, the six-Justice majority was evenly divided on the "constitutional question as to whether the Eleventh Amendment immunizes from suit agencies created . . . under state compacts." Without indicating any doubt as to the wisdom of finding an Eleventh Amendment immunity for bi-state corporations, three concurring Justices felt that it was unnecessary, given the finding of waiver, to reach the constitutional question.

10. *See generally*, R. Leach & R. Sugg, Jr., The Administration of Interstate Compacts 22 (1959):

> "Agencies established by interstate compact are identified administratively with the party states rather than with the federal government. They may develop close relations with federal departments . . . but they are no more a part of the federal administrative organization than any ordinary department of a state government."

But *Petty's* precedential value is strengthened by the three Justices in dissent. With Justice Frankfurter writing, they concurred in what they understood to be "[t]he Court['s] acknowledg[ment of] the applicability of the provisions of the Eleventh Amendment to the Tennessee-Missouri Bridge Commission." They limited their dissent to the finding of waiver.

The final tally has six Justices, along with the Court of Appeals for the Eighth Circuit, agreeing that bi-state compacts do preserve Eleventh Amendment immunity for entities created under them. Three Justices did not reach the question. None argued that the Eleventh Amendment does not apply.

Following the precedent of *Petty*, we conclude that the TRPA is immune from suit under the Eleventh Amendment so long as the states have not waived their immunity as to suit against the entity which they created. Moreover, even did we not consider ourselves bound by *Petty*, we still would find immunity for the reasons set forth in the opinion of the Eighth Circuit. *Petty v. Tennessee-Missouri Bridge Com'n*, 254 F.2d 857 (8th Cir. 1958).

We find in another part of this opinion that the states which joined in the Compact did not waive their immunity so as to allow suit against the TRPA.[11]

While adhering to the Eleventh Amendment, the federal courts have preserved for themselves the power to enjoin state officers from enforcing unconstitutional state laws. *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). In *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), an opinion defining the scope of the power preserved under *Ex parte Young*, the Supreme Court acknowledged the continuing force of that doctrine,

11. *See infra*, pp. [10-12].

choosing merely to limit it to the issuance of prospective equitable relief. 415 U.S. at 677, 94 S.Ct. at 1362.

Thus, plaintiffs in this case can maintain a suit for injunctive and declaratory relief against the officers of the TRPA, an offspring of the states of Nevada and California. Their potential relief must be limited to prospectively enjoining enforcement of the allegedly unconstitutional land use ordinance,[12] and a declaration of their rights with respect to it.

IV.

LIABILITY OF THE DEFENDANTS OTHER THAN THE TRPA

Appellants also appeal from the district courts' dismissals of the other defendants. Among them were counties in the Lake Tahoe area, the states of California and Nevada, the United States, and the executive director and members of the governing body of the TRPA.

A. *THE COUNTIES.*

The only possible cause of action against the counties would be one to enjoin their enforcement of the challenged ordinance. As to monetary and declaratory relief, the action against the counties was properly dismissed because the alleged infringement of constitutional rights arises from the action of the TRPA. The Compact limits the involvement of the counties to a sharing of the enforcement power with the cities, the states and the TRPA. Their involvement is purely ministerial, and thus peripheral to the allegations underlying this suit.

Moreover, there is no evidence that the counties would attempt to enforce the challenged ordinance were the court

12. Since Jacobson is no longer the owner of property affected by the ordinance, the district court properly dismissed his equitable claims. *See infra*, [pp. 21-22].

to declare it unconstitutional. It appears that the counties even look with favor on appellants' development plans. Hence, the district courts were not required to join the counties as necessary defendants pursuant to Fed.R.Civ.P. 19(a).

We conclude that it was not error to dismiss the suits as against the counties.

B. *THE STATES.*

California and Nevada were also joined as defendants, either on the theory that the TRPA was a political subdivision of the states, or alternatively that the zoning was a joint undertaking by the states and the TRPA. The district judges did not decide these issues, holding instead that any adjudication of condemnation would mean that the TRPA had exceeded the authority delegated to it and thus its actions would not be regarded as those of the states.[13]

We decide on another ground that the states are not proper parties.[14]

The Eleventh Amendment immunizes a state from suits brought in federal court by the state's own citizens as well as by citizens of a foreign state. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). Although this is an immunity which the state may waive at its pleasure, the conclusion that there has been a waiver of immunity from suit will not be lightly inferred. *Petty v. Tennessee-*

13. *See Western Int'l Hotels v. TRPA*, 387 F.Supp. 429, 439 (D.Nev.1975).

14. This court may affirm on any ground squarely presented on the record. *Jaffke v. Dunham*, 352 U.S. 280, 281, 77 S.Ct. 307, 1 L.Ed.2d 314 (1957); *M. O. S. Corp. v. John I. Haas Co.*, 375 F.2d 614, 617 (9th Cir. 1967). The issue of the Eleventh Amendment as a bar to suing the states was raised by at least one party below.

Even had it not been, "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar" that it would be proper to consider it for the first time on appeal. *See Edelman v. Jordan*, 415 U.S. 651, 678, 94 S.Ct. 1347, 1363, 39 L.Ed.2d 662 (1974); *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 467, 65 S.Ct. 347, 89 L.Ed. 389 (1945).

Missouri Bridge Com'n, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed. 2d 804 (1959).

Relying on *Petty*, appellants allege that California and Nevada waived their immunity to suit by enacting the Compact. In *Petty*, Congress approved a compact between Tennessee and Missouri containing a clause giving the Commission the right "to sue and be sued." Appellants seem to consider this language analogous to certain language in the Compact.

The difference between *Petty* and this case is that in *Petty* Congress attached a proviso that proved critical to the Supreme Court's determination that the states had waived immunity to suit against the bi-state corporation. The Court observed that

> [I]f there be doubt as to the meaning of the sue-and-be-sued clause in the setting of the compact prior to approval by Congress, the doubt dissipates when the condition [abrogating immunity] attached by Congress is accepted and acted upon by the two States.

359 U.S. at 281-82, 79 S.Ct. at 790.[15]

Discussing *Petty* in *Edelman v. Jordan, supra*, the Supreme Court emphasized that

> The question of waiver or consent under the Eleventh Amendment was found in [*Petty*] to turn on whether Congress had intended to abrogate the immunity in question and whether the State by its participation in

15. For evidence that there can be considerable doubt as to the meaning of a sue-and-be-sued clause, see the discussion in *Petty*, 359 U.S. 275, 283-89, 79 S.Ct. 785 (Frankfurter, J., dissenting).

the program authorized by Congress had in effect consented to the abrogation of that immunity.

415 U.S. at 672, 94 S.Ct. at 1360.[16]

Appellants have pointed to no similar, express proviso attached by Congress when it approved the Compact. Thus, if there has been a waiver, it must be found in the language of the Compact itself.

At oral argument, counsel argued that Article VI(b) of the Compact constituted a waiver of immunity. Their attempt to draw an analogy between that provision and the sue-and-be-sued clause in *Petty* seems to us somewhat contrived. Article VI(b) provides, in part, that the TRPA will be deemed a political subdivision of both states for purposes of suit. When read in conjunction with Article III(a), which provides that the TRPA is a separate legal entity, it appears that Article VI(b) was intended only to operate as a grant of state court jurisdiction over the TRPA. The provision admittedly is not without ambiguity,[17] but since waiver should not be lightly inferred, *Petty*, 359 U.S. at 276, 79 S.Ct. 785, we hold that there was no waiver.

C. *THE UNITED STATES.*

The United States was named as a defendant in No. 76-1608. That case was originally instituted in the California

16. *See also League to Save Lake Tahoe v. TRPA*, 507 F.2d 517, 523 & n.13 (9th Cir. 1974), *cert. denied*, 420 U.S. 974, 95 S.Ct. 1398, 43 L.Ed.2d 654 (1975).

17. Article VI(b) commands that suit should be brought in a court of the state where the violation was committed or where the property is located "unless the action is brought in a federal court." The reference to suit in a federal court admittedly is ambiguous, but we do not understand it to constitute a waiver of immunity. The phrase may refer to diversity suits or to suits by the TRPA against the United States under the Tucker Act. 28 U.S.C. §§ 1346, 1491 (1970).

Superior Court and was removed to the federal court. The district court dismissed the United States from the action, finding that the TRPA was not an agency of the United States.

There is no language in the Compact indicating that Congress gave its consent to allow suit against the United States. Without its consent, the United States cannot be sued. *Dugan v. Rank*, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963).

Moreover, although Congress, in the Tucker Act, 28 U.S.C. §§ 1346, 1491 (1970), waived sovereign immunity for certain claims and granted jurisdiction over them to federal district courts and the Court of Claims, it did not subject the United States to suit in a state court. Appellants brought this suit in a state court. Since the state court lacked jurisdiction, this federal court acquired none upon removal, *Minnesota v. United States*, 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235 (1939), even where we would have had jurisdiction had the suit been commenced here. *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.*, 258 U.S. 377, 42 S.Ct. 349, 66 L.Ed. 671 (1922).

Finally, the United States has an extremely limited involvement with the Compact. First, Congress consented to it. Second, as a condition of that consent, Congress insisted that the President of the United States be allowed to appoint a single non-voting representative to the governing body. Pub. L. No. 91-148, Art. 8(d) § 3, 83 Stat. 360 (1969). We agree with the district court that the approval of the Compact by Congress and the limited appointment power of the President do not thereby establish the TRPA as an agency of the United States.

The district court properly dismissed the suit as against the United States.

D. *THE EXECUTIVE DIRECTOR AND MEMBERS OF THE GOVERNING BOARD OF TRPA.*

The individual members of the TRPA's Governing Board and its Executive Director[18] were named as defendants in No. 76-1289. They allegedly violated appellant's constitutional rights by enacting and implementing the General Plan and Land Use Ordinance. The district court dismissed the complaint as to these defendants,[19] holding that "members of governmental bodies are immune from liability for damages arising out of their exercise of discretionary functions."

Before addressing the immunity issue, we must examine the jurisdictional basis of the action against these defendants. Appellant alleged jurisdiction under two statutes, 28 U.S.C. §§ 1331 and 1343. Section 1343 is the jurisdictional statute for civil rights actions arising under 42 U.S.C. § 1983 (1970). In order to establish a claim cognizable under § 1983, appellant must show that he has been deprived of a right secured by the Constitution and that such deprivation was achieved under color of state law. *Adickes v. Kress & Co.*, 398 U.S. 144, 94 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

In *League to Save Lake Tahoe*, 507 F.2d at 519-24, a case concerning the same bi-state Compact involved here, this court held that "[c]ongressional consent transforms the compact into a law of the United States." Since the challenged actions were taken by the individual officers pursuant to authority conferred by the Compact, the alleged

18. For brevity, the executive director and members of the governing board will be referred to as "officers" of the TRPA.

19. The suits against defendants Doug Leisz and Jack W. Deinema were dismissed voluntarily. C.T. 236-37.

deprivation of constitutional rights could not have been under color of state law.[20]

This court thus has no jurisdiction under § 1343, but appellant also relied on federal question jurisdiction under § 1331, which provided the jurisdictional basis for *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). The Court in *Bivens* fashioned a cause of action against federal officers for a violation of the Fourth Amendment. The Court implied a damages remedy directly from the Constitution, viewing it as an unsurprising remedy solidly rooted in history.[21]

Since appellant's claim is based on the Fifth, rather than the Fourth, Amendment, we must determine whether the rationale of *Bivens* can be extended to Fifth Amendment claims.

Although the question whether to limit the applicability of *Bivens* to the Fourth Amendment has apparently not been decided by this circuit,[22] most courts of appeals have held that the remedy is not so limited.[23]

20. This is not inconsistent with our earlier finding of state *action* to support a cause of action under the Fourteenth Amendment. The jurisdictional standard under §§ 1983 and 1343 is that there must be a deprivation of constitutional rights "under color of state *law*." (Emphasis added.) While the TRPA exercises the power of the constituent states, it does so pursuant to federal law.

21. 403 U.S. at 395-96, 91 S.Ct. at 2004, *quoting from Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 90 L.Ed. 939 (1946):

> "[I]t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."

22. In *Mark v. Groff*, 521 F.2d 1376, 1378 n.1 (9th Cir. 1975), the court noted that the question of a damages claim was not raised and the court chose to take no position on the question.

23. The following cases have extended the applicability of *Bivens*, or have indicated that they look with favor on such an ex-

We believe that this is the better view. The due process rights protected by the Fifth Amendment are as fundamental as those protected by the Fourth Amendment. Nothing in *Bivens* warrants limitation to Fourth Amendment claims; its rationale clearly supports extension to cases of this sort.

Having found jurisdiction under § 1331, we turn now to the immunity issue. We note at the outset that the major difference between a § 1983 claim and a *Bivens* claim is that, where the constitutional infringer has acted under color of state law, § 1983 is applicable and where the constitutional infringer acts under color of federal law, a *Bivens* action can lie. In *Mark v. Groff*, 521 F.2d 1376, 1380 (9th Cir. 1975), this court announced that

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tension: *Gagliardi v. Flint*, 564 F.2d 112 (3rd Cir. 1977); *Davis v. Passman*, 544 F.2d 865 (5th Cir. 1977) (extending *Bivens* to cover Fifth Amendment due process); *Rodriguez v. Ritchey*, 539 F.2d 394 (5th Cir. 1976) (extending to cover investigatory officers who did not participate in the actual arrest); *White v. Boyle*, 538 F.2d 1077 (4th Cir. 1976) (retaliatory IRS investigation could give rise to a *Bivens* action); *Paton v. La Prade*, 524 F.2d 862 (3rd Cir. 1975) (First Amendment); *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926 (10th Cir. 1975) (favorable dictum); *States Marine Line, Inc. v. Shultz*, 498 F.2d 1146 (4th Cir. 1974) (customs officers liable for improper performance of duties—Fifth Amendment due process); *United States ex rel. Moore v. Koelzer*, 457 F.2d 892 (3rd Cir. 1972) (extended to Fifth Amendment fair trial rights); *Butler v. United States*, 365 F.Supp. 1035 (D.Hawaii 1973) (First Amendment); *Washington v. Brantley*, 352 F.Supp. 559 (M.D.Fla. 1972) (favorable dictum).

The following courts have limited *Bivens* to Fourth Amendment cases: *Kostka v. Hogg*, 560 F.2d 37 (1st Cir. 1977); *Smothers v. Columbia Broadcasting System*, 351 F.Supp. 622, 626 n.4 (C.D.Cal. 1972); *Davidson v. Kane*, 337 F.Supp. 922 (E.D.Va. 1972).

The Second Circuit considers the question still open. *Wahba v. New York University*, 492 F.2d 96 (2nd Cir.), *cert. denied*, 419 U.S. 874, 95 S.Ct. 135, 42 L.Ed.2d 113 (1974). *But see Brault v. Town of Milton*, 527 F.2d 730, 734 (2nd Cir.), *rev'd en banc on other grounds*, 527 F.2d 736 (2nd Cir. 1975) (Fourteenth Amendment due process violation "comes within *Bivens*' sweeping approbation of constitutionally-based causes of action.").

> [W]e agree with several courts of appeals in holding that the official immunity doctrine in suits against federal officers for violation of constitutional rights is identical to the immunity doctrine applied in § 1983 suits. (Citations omitted.)

We thus turn to § 1983 law to determine the applicability and extent of the immunity doctrine as it relates to the officers of the TRPA. In dealing with the immunity doctrine, courts have established three functional classifications: judicial, *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); executive, *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); and legislative, *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951). We must determine which, if any, of the classifications applies to these appellees. We begin with an examination of the powers accorded them under the Compact.

To effectuate its purposes, the Compact mandated that "[w]ithin 90 days after the formation of the agency, the governing body shall adopt a regional interim plan" and that "[w]ithin 18 months after the formation of the agency, the governing body shall adopt a regional plan."[24]

Article VI of the Compact grants specified powers to the TRPA and its officers. Section (a) provides that "[t]he governing body shall adopt all necessary ordinances, rules, regulations and policies to effectuate the adopted regional and interim plans"; section (b) provides that "[a]ll ordinances, rules, regulations and policies adopted by the agency shall be enforced by the agency"; and section (e) provides that "[t]he agency shall police the region to ensure compliance with the general plan and adopted ordinances,

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24. Compact, Art. V(b) & (d).

rules, regulations and policies." In addition, Article V(c), and (f) granted the TRPA enforcement powers necessary to implement the interim plan and the regional general plan.

Thus, the agencies possess both legislative (adoption of ordinances, etc.) and executive (enforcement) powers. The immunity accorded to those acting in the different capacities is not identical.[25]

Absolute immunity is given to legislators for actions performed in their legislative function. *Tenney v. Brandhove, supra; Doe v. McMillan,* 412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d 912 (1973). Executive officers were given only a qualified immunity for their actions varying with "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time" in question. *Scheuer v. Rhodes,* 416 U.S. at 247, 94 S.Ct. at 1692. *See also Navarette v. Enomoto,* 536 F.2d 277 (9th Cir. 1976), *cert. granted,* 429 U.S. 1060, 97 S.Ct. 783, 50 L.Ed.2d 776 (1977) (No. 76-446); *Mark v. Groff,* 521 F.2d 1376 (9th Cir. 1975).

The problem in the present case is that we cannot tell from the state of this record whether the acts complained of arose by virtue of the officers' exercise of their legislative or executive powers. Because of our uncertainty on this issue, we remand to the district court for further factual development as to the nature of the challenged actions.

We do offer some guidelines for the district court on remand. We are fully aware that under § 1983 absolute immunity has been recognized only for state and federal legislators. *Doe v. McMillan, supra.* The question of immu-

25. *E. g., Thomas v. Younglove,* 545 F.2d 1171 (9th Cir. 1976). We presume that the executive director acted only in an executive capacity. The more complicated question involves only members of the governing board.

nity for officers acting under the authority of an interstate compact has not been squarely addressed, but we believe that such compacts, by their very nature, establish regional legislatures. In an area such as the Lake Tahoe Basin the legislature of either state could not deal effectively with problems that demand the consideration of a body which can weigh regional interests and wisdom.[26] We discern no reason why these "regional legislators" should not be accorded the same immunity as their state and national counterparts.

For parallel reasons, we also believe that these officers, as executives, might be given the same qualified immunity that the Court granted state executive officers in *Scheuer v. Rhodes, supra.* If the only complaint, as it relates to their executive function, is their enforcement of the challenged ordinance, such immunity would absolve the officers from liability. Therefore, appellant would have to show something more than evenhanded enforcement by the defendants of an ordinance with which he disagrees.

More specifically, we think the guidelines found in *Wood v. Strickland,* 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1974), are applicable. The Court held that a school board member is not immune from liability for damages if

> [h]e knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious

26. *See,* Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments,* 34 Yale L.J. 685 (1925):

> "Legislation is the answer and legislation must be coterminous with the region requiring control. . . . The regions are less than the nation and are greater than any one state. The mechanism of legislation must therefor be greater than that at the disposal of a single state."

intention to cause a deprivation of constitutional rights or other injury to the student.

420 U.S. at 322, 95 S.Ct. at 1001.

Similar analysis has been employed in the land use context. In *Cordeco Development Corp. v. Santiago Vasquez*, 539 F.2d 256 (1st Cir. 1976), Cordeco owned commercially valuable dunes in Puerto Rico. Defendant officers of the Commonwealth took no action on Cordeco's petition for a permit to extract sand, while granting permits to an adjoining and politically influential landowner. The court upheld imposition of liability as to "these two defendants [because they] were not acting within the scope of their lawful discretion or authority in refusing to process Cordeco's application." Indeed, the court concluded that defendants had "acted maliciously and wantonly, and with illegitimate 'political' or, at least, personal motives . . . ."

It is this kind of showing which must be made to create liability under *Bivens* as to the executive director or governing board members of the TRPA, at least to the degree that they acted in their executive capacity. And, as already discussed, to the degree that they acted in their legislative capacity, they have an absolute immunity from suit.

We recognize that the executive director and members of the governing board face a difficult task in trying to regulate and control development in the Lake Tahoe Basin. By subjecting them to possible liability under *Bivens* we would hold them responsible for their actions being mindful, however, that they must have wide latitude in the responsible, good-faith exercise of their authority. By limiting their liability to instances such as those discussed in *Wood v. Strickland* and *Cordeco Development Corp. v. Santiago Vasquez*, we think that sincere, well-meaning officials need not fear the threat of suit.

The immunity afforded governmental officers for damage suits does not defeat a claim for equitable relief. *Safeguard Mutual Insurance Co. v. Miller*, 472 F.2d 732 (3d Cir. 1973). Appellant has asked for affirmative injunctive and declaratory relief against the officers. He asks the court to order the members of the governing board to repeal the existing ordinance and to enact a new ordinance permitting their proposed developments.

Principles of federalism counsel against such affirmative intrusion into the executive branch of an agency of state or local government. *Rizzo v. Goode*, 423 U.S. 362, 380, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976). Those principles apply with equal force to the TRPA, a hybrid regional body both legislative and executive in nature. Any equitable relief granted in this case must be limited to what is absolutely necessary to redress the appellant's rights. Under the doctrine of *Ex parte Young, supra*, prohibitory injunctive relief against the enforcing officers is allowed.[27] Declaratory relief may also be granted if it is limited so as not to interfere excessively with the TRPA's

"latitude in the 'dispatch of its own internal affairs.'"

Cafeteria Workers v. McElroy, 367 U.S. 886, 896, 81 S.Ct. 1743, 1749, 6 L.Ed.2d 1230 (1961), *quoted in Sampson v. Murray*, 415 U.S. 61, 83, 94 S.Ct. 937, 949, 39 L.Ed.2d 166 (1974), *requoted in Rizzo v. Goode*, 423 U.S. 362, 378-79, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976).

V.

JACOBSON'S STANDING

The district judge in No. 75-2400 dismissed Jacobson's suit for lack of standing. In bankruptcy proceedings initi-

27. *See supra*, pp. [8-10].

ated subsequent to enactment of the challenged ordinance, Jacobson's interest in the affected property was assigned to another entity.

Only the present owner of land has standing to ask for equitable relief setting aside the zoning of his land. Hence, although Jacobson claims that he "retained" this cause of action, he could only have retained a claim for monetary relief. Since the record does not support Jacobson's contention, a position contrary to general principles of bankruptcy law, we hold that the district court properly dismissed his suit for lack of standing.

The four cases reviewed are affirmed in part, reversed in part, vacated in part and remanded for further consideration consistent herewith.

Appendix B

Order Denying Rehearing

United States Court of Appeals, Ninth Circuit.

ORDER

NATHAN S. JACOBSON,

Plaintiff-Appellant,

v.

TAHOE REGIONAL PLANNING AGENCY, a political subdivision of the States of Nevada and California, the State of Nevada, and the County of Washoe,

Defendants-Appellees.

MELVIN F. JONES, Verona M. Jones, his wife, Leo D. Wyrsch, Cora E. Wyrsch, his wife, Paul W. Gould, Lola E. Gould, his wife, Joseph Trinchero, Delores G. Trinchero, his wife, Paul Williams and Lanai Corporation, a California Corporation,

Plaintiffs-Appellants,

v.

TAHOE REGIONAL PLANNING AGENCY (T.R.P.A.), a political subdivision of the States of Nevada and California, California Tahoe Regional Planning Agency, the State of California, Placer County and Eldorado County,

Defendants-Appellees.

LAKE COUNTRY ESTATES, INC., a corporation, and Country Club Estates, a partnership,

Plaintiffs-Appellants,

v.

TAHOE REGIONAL PLANNING AGENCY, County of El Dorado, and State of California, et al.,

Defendants-Appellees.

LAYTON-TAHOE PROPERTIES

Plaintiff-Appellant,

v.

TAHOE REGIONAL PLANNING AGENCY, State of California, State of Nevada, County of Placer, and United States of America,

Defendants-Appellees.

Before: WRIGHT, GOODWIN and ANDERSON, Circuit Judges.

The petitions for rehearing are denied.

The opinion filed on December 21, 1977, is corrected in the following particulars:

Add to footnote 14, p. 3313 of the slip opinion:

> We believe that the Eleventh Amendment's jurisdictional nature also justified our raising the issue *sua sponte*.

Delete the sentence beginning on the bottom line, p. 3312 [p. 10], reading: "Hence, the district courts were not required to join the counties as necessary defendants pursuant to Fed. R. Civ. P. 19(a)."

Appendix C

Court of Appeals' Withdrawn Decision

NATHAN S. JACOBSON,

Plaintiff-Appellant,

v.

TAHOE REGIONAL PLANNING AGENCY, a political subdivision of the States of Nevada and California, the State of Nevada, and the County of Washoe,

Defendants-Appellees.

MELVIN F. JONES, Verona M. Jones, his wife, Leo D. Wyrsch, Cora E. Wyrsch, his wife, Paul W. Gould, Lola E. Gould, his wife, Joseph Trinchero, Delores G. Trinchero, his wife, Paul Williams and Lanai Corporation, a California Corporation,

Plaintiffs-Appellants,

v.

TAHOE REGIONAL PLANNING AGENCY (T.R.P.A.), a political subdivision of the States of Nevada and California, California Tahoe Regional Planning Agency, the State of California, Placer County and Eldorado County,

Defendants-Appellees.

LAKE COUNTRY ESTATES, INC., a corporation, and Country Club Estates, a partnership,

Plaintiffs-Appellants,

v.

TAHOE REGIONAL PLANNING AGENCY, County of El Dorado, and State of California, et al.,

Defendants-Appellees.

LAYTON-TAHOE PROPERTIES

Plaintiff-Appellant,

v.

TAHOE REGIONAL PLANNING AGENCY, State of California, State of Nevada, County of Placer, and United States of America,

Defendants-Appellees.

Nos. 75-2400, 76-1182, 76-1289 and 76-1608.

United States Court of Appeals, Ninth Circuit.

Aug. 5, 1977.

Appeals from the United States District Court for the Eastern District of California.

Before WRIGHT, GOODWIN and ANDERSON, Circuit Judges.

EUGENE A. WRIGHT, Circuit Judge:*

On this appeal we are once more concerned with that "centaur of legislation,"[1] an offspring of both state and federal law, the Tahoe Regional Planning Compact ("Compact"). Appellants complain that zoning ordinances of the Tahoe Regional Planning Agency ("TRPA"), a separate legal entity created under the provisions of the Compact, amount to an inverse condemnation or "taking" of their lands.

In each of the four consolidated cases presently on appeal, the underlying complaint was dismissed by the district court for failure to state a claim upon which relief can be granted.[2] Additionally, some defendants were dismissed from each suit. Each determination is appealed. We vacate two judgments, two others we affirm in part and reverse in part, and all four appeals are remanded for further proceedings.

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*Because of the number and complexity of the issues, all members of the panel participated in the writing of this opinion.

1. Comment, "Federal Question Jurisdiction to Interpret Interstate Compacts," 64 Geo.L.J. 87, 110 (1975).

2. Although the ultimate outcome was the same, the basis for dismissal varied among the consolidated cases. In *Jacobson v. TRPA*, No. 75-2400, the district judge held that Jacobson had not set forth facts sufficient, if proved, to rebut the presumption of constitutionality accompanying the acts of the TRPA. See *Western International Hotels et al., v. TRPA et al.*, 387 F.Supp. 429 (D. Nev. 1975). Jacobson amended his complaint but his suit was subsequently dismissed for lack of standing.

The other three cases on appeal were disposed of in one unreported consolidated opinion in which the district court ruled that, although the complaints stated facts sufficient for an action of inverse condemnation, such an action could not be brought against the TRPA because it lacked authority to condemn.

I.

THE TAHOE REGIONAL PLANNING COMPACT

Some background information is necessary for an understanding of this opinion. In 1968, California and Nevada entered into a compact to create a regional agency with powers to regulate and control development within the Lake Tahoe Basin. *Cal.Gov't Code* § 66800 *et seq.* (West Supp. 1974); *Nev.Rev.Stat.* § 277.190 *et seq.* (1973). The Compact was consented to by Congress in December 1969.[3] Pub.Law 91-148, 83 Stat. 360.

The governing body of the TRPA was charged with adopting ordinances, rules, regulations and policies to effectuate a regional plan setting minimum standards for water purity, zoning, shoreline development and the like.[4] The TRPA enacted a comprehensive Land Use Ordinance ("LUO"), effective February 10, 1972, in discharge of its duties under the Compact. This LUO limited the permitted uses of certain lands within the Basin, including those owned by appellants.

Under the LUO, "use districts" were established.[5] Land belonging to appellants and previously zoned as residential, multiple residential, or commercial was rezoned as "General Forest District,"[6] "Recreation District,"[7] or "Conservation

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3. Article I, § 10 cl. 3 of the United States Consitution provides in part:

> "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . ."

4. Compact, Art. VI(a).

5. TRPA Ordinance No. 4, section 7.00.

6 *Id.* section 7.20.

7. *Id.* section 7.30.

Reserve."[8] As a generalization, very limited residential and no tourist residential or commercial use was to be made of land zoned as one of the three districts. Among other permitted uses were these: hiking trails and campgrounds, stables, recreation camps, skiing facilities, timber growing, livestock grazing, and electrical substations. Additionally, outdoor recreation concessions and educational facilities were permitted in the Recreation District.

Appellants claim that these restrictions deprive them of "all beneficial use or development" of their land and they request injunctive, declaratory, and monetary relief. Their claims are based on the Fifth and Fourteenth Amendments to the Constitution and on the just compensation provisions of the respective state constitutions.

II.

DETERMINING THE PROPER CAUSE OF ACTION

(a) *The Compact as Federal Law.*

Before we can determine whether appellants' complaints will withstand a Fed.R.Civ.Pro. 12(b)(6) motion, we must determine under what law and what theories appellants can proceed to trial. The complaints are filled with a variety of constitutional references, state and federal, and allege actions of inverse condemnation and, more generally, of "taking."

Although the Compact is in essence a bi-state contract,[9] this circuit had held that congressional consent transforms the Compact into a law of the United States. *League to Save*

8. *Id.* section 7.110.

9. See discussion of Frankfurter, J., dissenting in *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 283-89, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959).

Lake Tahoe v. TRPA, 507 F.2d 517, 519 (9th Cir. 1974), *cert. denied*, 420 U.S. 974, 95 S.Ct. 1398, 43 L.Ed.2d 654 (1975).[10] Because the Compact is a federal law, the agency

Because it is the action of the TRPA which is the basis of these cases and because the TRPA acted under powers given it by the terms of the Compact, we are of the opinion that no cause of action has been stated under any *state* laws. Those causes of action grounded on the just compensation provisions of the California and Nevada state constitutions functioning under its terms is operating under federal law, although it is not necessarily a federal agency.[11]

10. In so doing the court chose between the two principal species of legislation: federal and state. As will be developed *infra*, this characterization is not without its difficulties. At least one commentator has suggested that it may be more fruitful to recognize compacts as a third and distinct species: interstate legislation. This would

> "permit, although not require, the inference that interstate agencies created by compact are subdivisions of neither the state nor the federal government, but are political entities *sui generis*, exercising a limited sovereignty distinct from that of the states which have delegated power to them, and from the United States."

Engdahl, "Construction of Interstate Compacts: A Questionable Federal Question", 51 Va.L.Rev. 987, 1040 (1965).

11. As the California United States District judge below noted, there is insufficient federal control or involvement to hold the United States responsible for TRPA's actions. Additionally, the Compact itself provided that TRPA was to be a separate legal entity. Compact, Art. III(a). More than this, however, special consideration should be given to the unique nature of interstate compacts. As noted in Leach R. & Sugg, Jr. R., *The Administration of Interstate Compacts* 22 (1959):

> "Agencies established by interstate compact are identified administratively with the party states rather than with the federal government. They may develop close relations with federal departments . . . but they are no more a part of the federal administrative organization than any ordinary department of a state government. The use of compacts is still too new, however, for any well-defined concept of the proper relations between a state and a compact agency to which it subscribes to have developed."

were therefore properly dismissed for failure to state a claim upon which relief can be granted.

(b) *Actions Under the United States Constitution.*

The complaints also mentioned the due process clause of the Fourteenth Amendment which safeguards personal rights against arbitrary and oppressive state action. Thus, if the TRPA's enactment of the LUO was such an over-zealous use of its police powers as to amount to a taking of appellants' property, it might, in the proper circumstances, fall under the due process clause of the Fourteenth Amendment.

This amendment applies also to acts of political subdivisions of the state. *Lowe v. Manhattan Beach City School District,* 222 F.2d 258 (9th Cir. 1955) (school district); *Miller v. County of Los Angeles,* 341 F.2d 964 (9th Cir. 1965) (county). Whether a cause of action under the Fourteenth Amendment can be stated against the TRPA would turn on whether it is an agent or political subdivision of the state.

Because of the complex nature of the Compact and the difficulties inherent in categorizing those operating under it, the district courts did not decide whether the agency was an arm of the state. We also do not find it necessary to decide this issue. It is not relevant in deciding whether a cause of action is stated against the states because, as discussed hereafter, the states were properly dismissed as defendants because they did not waive their Eleventh Amendment immaturity from suit.

The due process clauses of the Fifth and Fourteenth Amendments are sufficiently similar for analytical purposes so that if a cause of action were stated under the Fifth Amendment, a claim under the Fourteenth would also be stated, if there were a proper defendant against whom to

state it. A separate discussion of a possible Fourteenth Amendment claim is therefore not necessary for purposes of due process analysis. Thus we need not further refine the characterization of the TRPA.

We now consider the possibility of a claim under the Fifth Amendment to the Constitution. For our purposes there are two relevant clauses: the due process and the just compensation (condemnation) clauses. It is our opinion that the two, although relying on substantially the same evidence when a suit based on either is brought in the context of this factual situation, provide the bases for two separate possible causes of action.

We find that a cause of action for inverse condemnation cannot be stated against the TRPA because it lacks condemnation authority.[12] We do not find, however, that this requires dismissal of appellants causes of action. The same facts alleged by appellants do form the basis for a claim of denial of due process under the Fifth Amendment for an improper "taking" of their land. This court has stated:

> The due process clause, in its procedural as opposed to its substantive aspect, guarantees plaintiffs that their liberty and property interests will not be invaded by the government except insofar as they are given an opportunity to challenge the purported justification (legal, factual, or both) of the invasion. Thus, to make out a prima facie claim that they have been denied due

12. TRPA was given only the power to regulate, not the power to condemn. The statutory grant of the power of eminent domain must be indicated by express terms or by clear implication. *Western Union Tel. Co. v. Penn. R.R.,* 195 U.S. 540, 569, 25 S.Ct. 133, 49 L.Ed. 312 (1904). *See also Hudson Water Co. v. McCarter,* 209 U.S. 349, 355, 28 S.Ct. 529, 52 L.Ed. 828 (1908); *Atlantic Coast Line R. Co. v. North Carolina Corp. Comm'n,* 206 U.S. 1, 20, 27 S.Ct. 585, 51 L.Ed. 933 (1906). The delegation of police power to TRPA was neither an express grant of condemnation power nor one by implication.

process, plaintiffs must establish two elements: (1) that their liberty or property interests have been invaded by the government without an opportunity to challenge that invasion, and (2) that the purported justification for the invasion is at least plausibly disputable (otherwise an opportunity to challenge that justification would be an empty formality).

Rainbow Valley Citrus Corp. v. Federal Crop Insurance Corp., 506 F.2d 467, 469 (9th Cir. 1974).

Perhaps an argument could be made that, because the TRPA is not a federal agency, it is not "the government" and therefore the Fifth Amendment is inapplicable, just as the Fourteenth Amendment is inapplicable if the TRPA is not a state agency. This reasoning, however, could lead to the untenable conclusion that the TRPA is immune from suit because of its somewhat unique status: part state and part federal but not entirely either.

We conclude that the fact that the Compact is a federal law is sufficient to bring the TRPA within the reach of the Fifth Amendment. As the Supreme Court has stated:

> Due process of law in [the Fifth Amendment] refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law.

Hurtado v. California, 110 U.S. 516, 535, 4 S.Ct. 111, 120, 28 L.Ed. 232 (1884). The Compact has been held to be a "law of the land" and was made such by means of powers delegated to Congress in Art. I, section 10, cl. 3 of the constitution.

Were this not enough, federal courts could call upon their inherent "judicial inventiveness"[13] to meet this new situation. The "flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law." 110 U.S. at 530, 4 S.Ct. at 118. Federal common law doctrines[14] are not frozen in form and reach, and courts must "take account of the evolution of common law principles in the light of current perceptions and needs." *United States v. Schoefield*, 150 U.S.App.D.C. 380, 465 F.2d 560, 561, *cert. denied*, 409 U.S. 881, 93 S.Ct. 210, 34 L.Ed.2d 136 (1972). The due process clause was intended to protect the individual from arbitrary exercise of the powers of the government. This common-sense principle will not be circumvented by forms and procedures, unknown to our ancestors in England and therefore for which there is no age-old basis in the common law tradition.

III.
DETERMINING WHETHER A CLAIM HAS BEEN STATED

Having decided that appellants can state a claim under the Fifth Amendment due process clause, the next inquiry is whether they have, in fact, done so. We first determine what standard of review applies.

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13. *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 465, 77 S.Ct. 923, 1 L.Ed.2d 972 (1957) (Frankfurter, J. dissenting).

14. Clearly there is a "federal common law" even if not a "federal general common law." See Wright, *Federal Courts*, § 60 at 214 (1963) (discussing Justice Brandeis' same-day statements in Erie R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed.2d 1188 (1938) and *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110, 58 S. Ct. 803, 82 L.Ed. 1202 (1938). Federal common law binds the states through the supremacy clause and is a law of first resort, subject to revisions by subsequent legislation. See Note, 82 Harv.L. Rev. 1512 (1969); Monaghan, "Foreword: Constitutional Common Law," 89 Harv.L.Rev. 1 (1975).

In the *Jacobson* case, the district judge noted that the complaint challenged the constitutionality of an administrative enactment. Relying on *Pacific States Box & Basket Co. v. White,* 296 U.S. 176, 56 S.Ct. 159, 80 L.Ed. 138 (1935), he held that the acts of an administrative body are entitled to the same presumption of constitutionality accorded legislative acts and that a stricter standard of pleading was therefore applicable when judging a motion to dismiss. *See* 387 F.Supp. at 436—38.

> The burden is not sustained by making allegations which are merely the general conclusions of law or fact. . . Facts relied upon to rebut the presumption of constitutionality must be specifically set forth.

296 U.S. at 185, 56 S.Ct. [159], at 163, *quoted* in 387 F.Supp. at 437.

Under this standard of pleading, none of the complaints in any of the four consolidated cases on appeal would withstand a motion to dismiss because they lack specific factual allegations which, if proved, would rebut the presumption of constitutionality. Although *Pacific States* has never been explicitly overruled, we do not believe that it states the present law applicable to a motion to dismiss for failure to state a claim. *Pacific States* was decided two years before the promulgation of the Federal Rules of Civil Procedure and we find no precedent in this circuit for its application in this context since that time.

In *Conley v. Gibson,* 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), the Supreme Court explained the modern philosophy concerning pleadings:

> . . . the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require

> is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

355 U.S. at 47—48, 78 S.Ct. at 103.

Under the federal rules, a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. 2A *Moore's Federal Practice* ¶ 12.08 (1975). Pleadings are to be liberally construed.

Under this standard of pleading, which we apply in this case, both district judges found the complaints to be adequate to withstand the 12(b)(6) motion.[15] We agree. The allegations of taking, even though phrased in terms of inverse condemnation, do evidence that appellants complained that the police powers of the TRPA were improperly exercised and that they relied on the Fifth Amendment.

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15. The California judge was clear on this point. The Nevada judge was less emphatic, stating: "It would appear, nevertheless, that these essentially conclusory complaints might withstand a motion to dismiss in the usual case." 387 F.Supp. at 436. He went on to apply the *Pacific States* standard. *Id.* at 437. We take his language to imply, however, that he would have found the complaints adequate in the usual case.

We therefore reverse the district courts' rulings on this point. Although appellants may wish to amend their complaints on remand to the district court in light of our opinion, we do believe that their complaints are sufficient under the federal rules to state a claim upon which relief may be granted.[16]

IV.

DISMISSAL OF THE DEFENDANTS

Appellants also appeal from the district courts' dismissals of all party defendants except the TRPA. Among those dismissed were counties in the Lake Tahoe area, the states of California and Nevada, the United States and the individual members of the governing body of the TRPA at the time the LUO was enacted. We shall discuss them individually.

(a) *The Counties.*

Fed.R.Civ.Pro. 20(a) allows joinder of parties as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief arising out of the same occurrences and if any question of law or fact common to all defendants will arise in the action. Appellants joined the counties because they have enforcement authority of the

16. We anticipate that such amendments might take the form of omitting the inappropriate state claims, among other matters. Additionally, borrowing again from the condemnation literature, we note that mere diminution of value will not suffice to establish a "taking." *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915); *HFH Ltd. v. Superior Court*, 15 Cal.3d 508, 125 Cal.Rptr. 365, 542 P.2d 237 (1975), *cert. denied*, 425 U.S. 904, 96 S.Ct. 1495, 47 L.Ed.2d 754 (1976). Clearly, however, a taking can occur even when land is not physically appropriated by another. 2 *Nichols' The Law on Eminent Domain* § 6.3 (1976).

Tahoe Regional General Plan under Art. V(c) of the Compact (along with the TRPA, the states and the cities).

Appellants' cause of action arises from the enactment of the LUO. They seek monetary damages and a declaration of their rights under the ordinance. There is no reason to believe that the counties would attempt to enforce the LUO were it declared invalid by a court of law. Indeed, the counties appear favorable to appellants' development plans.

Furthermore, the TRPA is not an agent of the counties which have no financial liability for any monetary damages that might be assessed. Their financial obligations are fixed by provisions of the Compact.

Appellants can obtain complete relief without joining the counties in their suits. The counties were therefore properly dismissed.

(b) *The States.*

California and Nevada were also joined as defendants, either on the theory that the TRPA was a political subdivision of the states, or alternatively that the zoning was a joint undertaking by the states and the TRPA. The district judges did not decide these issues, holding instead that any adjudication of condemnation would mean that the TRPA had exceeded the authority delegated to it and thus its actions would not be regarded as those of the states. *See* 387 F.Supp. at 439.

We decide on another ground that the states are not proper parties.[17] The issue of the Eleventh Amendment as

17. This court may affirm on any ground squarely presented on the record. *Jaffke v. Dunham*, 352 U.S. 280, 281, 77 S.Ct. 307, 1 L.Ed.2d 314 (1957); *M.O.S. Corp. v. John I. Haas Co.*, 375 F.2d 614, 617 (9th Cir. 1967).

a bar[18] to suing the states was raised by at least one party below. Even had it not been raised, "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar" that it would be proper to consider it for the first time on this appeal. See *Edelman v. Jordan,* 415 U.S. 651, 678, 94 S.Ct. 1347, 1362, 39 L.Ed.2d 662 (1974); *Ford Motor Co. v. Dept. of Treasury,* 323 U.S. 459, 467, 65 S.Ct. 347, 89 L.Ed. 389 (1945).

The Eleventh Amendment has been held to immunize a state from suits brought in federal court for money claims payable from a state treasury by the state's own citizens as well as by citizens of a foreign state. *Edelman,* 415 U.S. at 663, 94 S.Ct. 1347. Although this is an immunity which the state may waive at its pleasure, the conclusion that there has been a waiver of immunity from suit will not be lightly inferred. *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275, 276, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959).

Relying on *Petty,* appellants allege that California and Nevada waived their immunity to suit by enacting the Compact. In *Petty,* Congress approved a compact between Tennessee and Missouri containing a clause giving the Commission the right "to contract, and to sue and be sued." In some respects this language is similar to that in Art.

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18. The Eleventh Amendment provides:
"The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens, or Subjects of any Foreign State."

For a fuller discussion of express and implied waiver of Eleventh Amendment immunity *see* Comment, *"Edelman and Scheuer:* The Relationship Between the Eleventh Amendment and Executive Immunity," 58 Marq.L.Rev. 741 (1975).

VI(b) and VI(e) of the Tahoe Compact allowing the TRPA to bring suit and be a party in actions brought in state and federal courts of the state where the violation of the general plan occurred or where the property was affected.

The difference between *Petty* and this case is that in *Petty,* Congress, in approving the compact, attached a proviso that its approval should not be construed as affecting, impairing, or diminishing federal court jurisdiction over matters arising under the compact. No similar proviso was attached when Congress approved the Tahoe Compact. The added proviso became critical when the Supreme Court determined that Tennessee and Missouri had waived their immunity to suit. The Court stated:

> The States who are parties to the compact by accepting it and acting under it *assume the conditions that Congress under the Constitution attached.* So if there be doubt as to the meaning of the sue-and-be-sued clause in the setting of the compact prior to approval by Congress, the doubt dissipates *when the condition attached by Congress is accepted and acted upon by the two States.*

359 U.S. at 281-82, 79 S.Ct. at 790 (emphasis added and footnote omitted).

Discussing *Petty* and *Edelman* the Court emphasized the presence of congressional intent, stating:

> The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of the immunity.

415 U.S. at 672, 94 S.Ct. at 1360.[19] Appellants have indicated no language attached by Congress in approving the Compact, nor have we found any, which indicates that Congress intended to abrogate the immunity of the states. Any waiver must therefore be found in the language of the Compact itself.

In oral argument, counsel referred us to Article VI(b) of the Compact as indicative of a waiver of immunity. This provision provides in part that the TRPA will be deemed a political subdivision of both states for purposes of suit. When read in conjunction with Art. III(a) of the Compact, indicating that the TRPA was to be a separate legal entity, however, it appears that Art. VI(b) was intended to operate as a grant of state court jurisdiction over the TRPA. The provision is admittedly not without ambiguity. The question of waiver is one of federal law, however, 359 U.S. at 279, 79 S.Ct. 785. The existence of waiver is not to be lightly inferred. Therefore, in the light of a lack of an express waiver of suit by the contracting states, we will not imply it here.

(c) *The United States.*

J. BLAINE ANDERSON, Circuit Judge:

The United States was named as a party defendant in No. 76-1608 (*Layton-Tahoe v. TRPA*). That case was originally instituted in the California Superior Court and was removed to the United States District Court on motion of the government. The district court dismissed the United States from the action, finding that the TRPA was not an agency of the government and that there was no "authority which permits the federal defendants to be sued."

The involvement of the United States with the Compact

19. See also *League to Save Lake Tahoe v. TRPA et al.*, 507 F.2d 523, n.13 (9th Cir. 1974), *cert. denied*, 420 U.S. 974, 95 S.Ct. 1398, 43 L.Ed.2d 654 (1975).

is limited to two different aspects. First, in 1969, Congress, by enacting Public Law 91-148, gave its approval and consent to the Compact entered into by California and Nevada. Second, the government's present involvement in the Compact is found in Article VIII, Section 3 of the Compact, which allows the President of the United States to appoint a non-voting representative to the governing body. We agree with the district court that the approval of the Compact by Congress did not thereby establish TRPA as an agency of the United States and also that the government's limited present involvement with the Compact is insufficient to hold the United States responsible for TRPA's actions.

Moreover, there is no language in the Compact indicating that Congress gave its consent to allow the United States to be sued. The United States cannot be sued without its consent. *Dugan v. Rank*, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963). It rests with Congress to determine whether the United States may be sued, and, if so, in what court. *Minnesota v. United States*, 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235 (1939). Congress, in enacting the Tucker Act (see 28 U.S.C. §§ 1346 and 1491), which waived sovereign immunity for certain claims, provided for jurisdiction in the federal district court or the United States Court of Claims, but it did not subject the United States to suit in a state court. This suit was begun in a state court and if that state court lacked jurisdiction, the federal court acquired none upon removal, *Minnesota v. United States, supra*, even where the federal court would have had jurisdiction had the suit been commenced in federal court. *Lambert Run Coal Co. v. Baltimore & Ohio R. Co.*, 258 U.S. 377, 42 S.Ct. 349, 66 L.Ed. 671 (1922).

The district court properly dismissed the United States

from this action as it was without jurisdiction over the United States where the United States did not give its consent to be sued.

(d) *Individual Members of the TRPA Governing Board.*

The individual members of TRPA's Governing Board and its Executive Director were named as party defendants in No. 76-1289 (*Lake Country Estates, Inc. v. TRPA*). These individuals are named in appellant's Seventh and Eighth Causes of Action, which allege that they, as members of TRPA's Governing Board, violated appellant's constitutional rights by enacting and implementing the General Plan and Land Use Ordinance, thereby taking appellant's property without due process of law and without just compensation. The district court dismissed the complaint as to these individual defendants,[20] holding that "members of governmental bodies are immune from liability for damages arising out of their exercise of discretionary functions." (C.T. 186)

Before addressing the immunity issue, we must examine the jurisdictional basis of this action against these individual defendants. Appellant alleged jurisdiction under two statutes, 28 U.S.C. § 1331 and § 1343 (1970). Section 1343 is the jurisdictional statute for civil rights actions arising under 42 U.S.C. § 1983 (1970). In order to establish a claim cognizable under § 1983, appellant must show that he has been deprived of a right secured by the Constitution and that such deprivation was achieved under color of state law. *Adickes v. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

The acts complained of here arise solely out of the actions taken by these individuals in their capacity as members of TRPA's Governing Board and as the Executive Director of TRPA. Any action cognizable under § 1983 necessarily depends upon the source of powers given to these individuals as members of TRPA. This court, in *League to Save Lake Tahoe v. TRPA, supra,* held that the Compact is a matter of federal law. Because the Compact giving rise to TRPA is a matter of federal law, the jurisdictional requisite of state action is missing and no action can be stated under § 1983 against these individual members of TRPA.

Appellant also relied upon the federal question jurisdiction statute. 28 U.S.C. § 1331 (1970). This statute was used in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), in which the Court fashioned a federal cause of action for damages against federal officers for a violation of the Fourth Amendment. The Court implied a damages remedy directly from the Constitution and viewed it as an unsurprising and historically-indicated remedy:

> [I]t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

403 U.S. at 395-96, 91 S.Ct. at 2004, *quoting* from *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 90 L.Ed. 939 (1946) (footnote omitted).

In *Bivens* it did not matter whether the availability of money damages was necessary to enforce the Fourth Amendment or whether there was prior congressional authorization for such a remedy. Instead, the Court framed the question as whether petitioner was "entitled to redress his injury through a particular remedial mechanism nor-

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20. Defendants Doug Leisz and Jack W. Deinema were voluntarily dismissed without prejudice on January 4, 1974. C.T. 236-37.

mally available in the federal courts. *Cf. J. I. Case Co. v. Borak,* 377 U.S. 426, 433, 84 S.Ct. 1555, 1560, 12 L.Ed.2d 423 (1964)." 403 U.S. at 397, 91 S.Ct. at 2005.[21]

Appellant's claim is based on the Fifth, not the Fourth Amendment. We must therefore determine whether the rationale of *Bivens* can be extended to cover constitutional rights other than those based on the Fourth Amendment.

The Court's reasoning in *Bivens* is applicable to rights protected by other than the Fourth Amendment. Although the question whether to limit the applicability of *Bivens* has apparently not been decided by this circuit[22] and district courts deciding the question have differed in their dispositions, most courts of appeals have held that the remedy is not limited to Fourth Amendment violations alone.[23] We believe that this is the better reasoned view. Nothing in the

21. Justice Harlan's approach in his concurring opinion emphasized the availability of equitable remedies to redeem constitutional rights. This is a more helpful approach than that of the majority. *See* Note, 33 U.Pitt.L.Rev. 271 (1971). Equitable remedies can be employed against officials acting outside the scope of their constitutional authority.

22. In *Mark v. Groff,* 521 F.2d 1376, 1378 n. 1 (9th Cir. 1975), the court noted that the question of a damages claim was not raised and the court chose to take no position.

23. The following cases have been favorable to extending or have extended the applicability of *Bivens*:
Davis v. Passman, 544 F.2d 865 (5th Cir. 1977) (extending *Bivens* to cover Fifth Amendment due process); *Rodriguez v. Ritchey,* 539 F.2d 394 (5th Cir. 1976) (extending to cover investigatory officers who did not participate in the actual arrest); *White v. Boyle,* 538 F.2d 1077 (4th Cir. 1976) (retaliatory IRS investigation could give rise to a *Bivens* action); *Paton v. La Prade,* 524 F.2d 862 (3rd Cir. 1975) (First Amendment); *Dry Creek Lodge Inc. v. United States,* 515 F.2d 926 (10th Cir. 1975) (favorable dictum); *States Marine Line, Inc. v. Schultz,* 498 F.2d 1146 (4th Cir. 1974) (customs officers liable for improper performance of duties—Fifth Amendment due process); *United States ex rel. Moore v. Koelzer,* 457 F.2d 892 (3rd Cir. 1972) (extended to Fifth Amendment rights to a fair trial); *Butler v. United States,* 365 F.Supp. 1035 (D.Hawaii 1973) (First Amendment); *Washington v. Brantley,* 352 F.Supp. 559 (M.D.Fla.1972) (favorable dictum).
The following district courts have limited *Bivens* to Fourth Amendment cases: *Smothers v. Columbia Broadcasting System,* 351 F.Supp. 622, 626 n. 4 (C.D.Cal.1972); *Davidson v. Kane,* 337 F.Supp. 922 (E.D.Va.1972).
The Second Circuit has considered the question to be open. *Wahba v. New York University,* 492 F.2d 96 (2nd Cir.), *cert. denied,* 419 U.S. 874, 96 S.Ct. 135, 42 L.Ed.2d 113 (1974). *But see Brault v. Town of Milton,* 527 F.2d 730, 734 (2nd Cir.), *rev'd en banc on other grounds,* 527 F.2d 736 (2nd Cir. 1975) (Fourteenth Amendment due process violation "comes within *Bivens'* sweeping approbation of constitutionally-based causes of action."). The First Circuit has recently found no need to reach the question (in a Fourteenth Amendment context), thus leaving the possibility of extending *Bivens* in that circuit. *Comtronics, Inc. v. Puerto Rico Tele. Co.,* 553 F.2d 701 (1st Cir. 1977).

language of *Bivens* or its rationale warrants a limitation solely to Fourth Amendment claims.

The rights protected by the Fifth Amendment due process clause are as fundamental as Fourth Amendment rights. The similarities between the due process clause and the just compensation clause (for which a monetary remedy *is* provided) in the context of this case lends support to the appropriateness of recognition of this claim under the *Bivens* constitutional tort doctrine. By its allegation of jurisdiction under § 1331 it is clear that in addition to its § 1983 claim, the appellant is pursuing a separate claim which derives directly from the Constitution. Jurisdiction was properly asserted under 28 U.S.C. § 1331 (1970).

Turning now to the immunity issue, we note at the outset that the only difference between a § 1983 claim and a *Bivens* claim is that, where the constitutional infringer has acted under color of state law, § 1983 is applicable and where the constitutional infringer acts under color of federal law, a *Bivens* action can lie. Appropriately,. courts

have, for the most part, applied § 1983 law to *Bivens*-type actions. *See, e.g., Brubaker v. King,* 505 F.2d 534 (7th Cir. 1974). This court, in *Mark v. Groff,* 521 F.2d 1376 (9th Cir. 1975), stated:

> Accordingly, we agree with several courts of appeals in holding that the official immunity doctrine in suits against federal officers for violation of constitutional rights is identical to the immunity doctrine applied in § 1983 suits.

(Citations omitted.) 521 F.2d at 1380. We also will resort to § 1983 law to determine the applicability and extent of the immunity doctrine as it relates to the individual governing members of TRPA.

Our first task is to determine the type of functions undertaken by these individuals because that classification will control the type and extent of immunity accorded these individuals. Courts in dealing with the immunity doctrine have established three general classifications: judicial, *Pierson v. Ray,* 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); executive, *Scheuer v. Rhodes,* 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); and legislative, *Tenney v. Brandhove,* 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951). We must determine which, if any, of the classifications apply to these individual appellees. To begin this analysis we examine the powers accorded them under the Compact.

The Tahoe Regional Planning Compact was enacted "[i]n order to encourage the wise use and conservation of the waters of Lake Tahoe and of the resources of the area around said lake, . . ." [24] It was desired "that there be established an areawide planning agency with power to adopt and enforce a regional plan of resource conservation and

24. Pub.L. 91-148, 83 Stat. 360 (statement of purpose).

orderly development, . . ."[25] The Compact created the Tahoe Regional Planning Agency as "a separate legal entity" and provided that its members shall be appointed by the various counties and cities in the area and from each state. To effectuate its purposes, the Compact mandated that "[w]ithin 90 days after the formation of the agency, the governing body shall adopt a regional interim plan" and also that "[w]ithin 18 months after the formation of the agency, the governing body shall adopt a regional plan."[26]

The powers given to the agency and its governing body are found in Article VI of the Compact. Section (a) thereof states, "The governing body shall adopt all necessary ordinances, rules, regulations and policies to effectuate the adopted regional and interim plans." Section (b) states "All ordinances, rules, regulations and policies adopted by the agency shall be enforced by the agency . . ." Section (e) states, "The agency shall police the region to ensure compliance with the general plan and adopted ordinances, rules, regulations and policies." Additionally, the agency was given enforcement power over the provisions of the interim plan and the regional general plan. *See* Compact, Art. V(e) and (f).

The above review of the agency's powers demonstrates that the agency possess legislative powers (adoption of ordinances, etc.) and executive powers (enforcement powers). The immunity afforded to those acting in these different capacities under § 1983 law is also different.[27] Absolute immunity is given to legislators for actions performed in their legislative function. *Tenney v. Grandhove, supra; Doe v. McMillan,* 412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d

25. Compact, Art. I(e).

26. Compact, Art. V(b) & (d).

27. *E. g., Thomas v. Younglove,* 545 F.2d 1171 (9th Cir. 1976).

912 (1973). Executive officers, on the other hand, are given a qualified immunity for their actions dependent on "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time" in question. *Scheuer v. Rhodes,* 416 U.S. at 247, 94 S.Ct. at 1692; *see also Navarette v. Procunier,* 536 F.2d 277 (9th Cir. 1976); *Mark v. Groff,* 521 F.2d 1376 (9th Cir. 1975).

The problem in the present case is that we cannot tell from the state of this record whether the acts complained of arise by virtue of the individuals' legislative powers or their executive powers. From our reading of appellant's complaint it appears that the principal basis of appellant's cause of action arises by virtue of the governing body's enactment of the Land Use Ordinance; however, that enactment also carries with it the power to enforce the ordinance. Accordingly, we believe that it is proper to remand to the district court for further factual development as to the exact nature of the complained of actions.

We will offer some guidelines for the district court on remand. We believe that the individuals should be given absolute immunity as in § 1983 actions for any actions taken in their legislative function. We are aware that absolute immunity has only been given to state and national legislators under § 1983 law. *Doe v. McMillan, supra.* We also note that the question of immunity to be afforded to members of an interstate compact has never been squarely addressed. We believe that the nature of these compacts, in effect, establishes a "regional legislature." In an area such as Lake Tahoe the legislature of either state cannot effectively deal with problems that transcend state boundaries. Neither can Congress adequately deal with these regional problems because they require treatment by a body which will take into account regional interests, regional pride, and regional wis-

dom. As two authors have noted in writing about interstate compacts:

> Legislation is the answer and legislation must be coterminous with the region requiring control. . . . The regions are less than the nation and are greater than any one state. The mechanism of legislation must therefore be greater than that at the disposal of a single state.[28]

We see no reason not to accord these "regional legislators" the same immunity accorded their state and national counterparts.

We also believe that these individuals should be given the same qualified immunity espoused in *Scheuer v. Rhodes, supra,* for acts in their executive capacities. The problem in this case is compounded because these "regional legislators" are empowered with enforcement powers over their own legislation. If the only complaint, as it relates to their executive function, is the formal enforcement of the ordinances they enacted, qualified immunity would absolve these individuals from liability. Stated another way, the appellant must show something more than an evenhanded enforcement of the ordinance with which it disagrees.

Appellant also seeks declaratory and injunctive relief against the individual members seeking to require them to repeal the existing ordinances and to enact new ordinances permitting the proposed development. The immunity afforded governmental officers for damage suits does not defeat a claim for equitable relief, *Safeguard Mutual Insurance Co. v. Miller,* 472 F.2d 732 (3rd Cir. 1973), but the type of relief requested would put the court directly in a legislative role, a situation to be avoided. *New Orleans Waterworks Company v. New Orleans,* 164 U.S. 471, 482, 17

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28. Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments,* 34 Yale L.J. 685 (1925).

S.Ct. 161, 41 L.Ed. 518 (1896); *Real Estate Development Company v. City of Florence,* 327 F.Supp. 513 (E.D.Ky. 1971). Moreover, as previously noted, the agency remains a defendant. This provides appellant an opportunity to obtain complete relief by seeking an adjudication that the land use ordinance is invalid so that appellant may proceed with its development.

V.
SEPARATE ISSUES

(a) *Jacobson v. TRPA,* No. 75—2400.

EUGENE A. WRIGHT, Circuit Judge:

Several remaining issues are pertinent only to one or two of the cases on appeal. The first is whether appellant Jacobson lacks standing to sue.

Data Processing v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), set forth two requirements for standing: (1) the action challenged must have caused the plaintiff injury in fact; and (2) the interest sought to be protected must arguably be within the zone of interests protected. Additionally, as this court recognized in *Bowker v. Morton,* 541 F.2d 1347, 1349 (9th Cir. 1976), the recent Supreme Court cases of *Simon v. Eastern Kentucky Welfare Rights* Organization, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed. 450 (1976), and *Warth v. Seldin,* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), indicate that a plaintiff must allege facts from which it can reasonably be inferred that this injury resulted in a "concretely demonstrable way" from defendant's action *and* that a grant by the court of the relief sought will remedy the wrong plaintiff suffers.

Whether Jacobson meets these tests depends on what interest has Jacobson on which he bases his suit and on our determination of what remedies are available to him.

Jacobson was the sole stockholder of the general partner in the limited partnership of Kings Castle Limited Partnership (KCLP). He was a limited partner in KCLP as well. KCLP owned property in the Lake Tahoe area when the LUO was enacted. Subsequent to the enactment of the ordinance, KCLP went bankrupt. During the bankruptcy proceedings it assigned its property interest to another entity. Jacobson, however, alleges that he "retained"[29] his present cause of action against the TRPA. He therefore brought suit for an improper taking of his interest in the land.

In his first complaint he requested declaratory and monetary relief. The district judge dismissed his cause of action for failure to state a claim upon which relief could be granted. The court held the monetary relief was unobtainable because the TRPA lacked the power to condemn. The possibility of declaratory or injunctive relief was left open, however.

Jacobson then amended his complaint to request declaratory and injunctive relief. This action was also dismissed, the district judge properly determining that Jacobson had no standing to request injunctive or declaratory relief because only a present owner of land has standing to attempt to set aside the zoning of his land. The judge indicated, how-

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29. We give Jacobson the benefit of the doubt as to what he meant by alleging that he "retained" his present cause of action. This is a matter for clarification upon remand to the district court.

It is well settled that the right to recover compensation from condemnation of property remains in the one who owned the property at the time of taking, regardless of whether the property is subsequently transferred to another. 2 Nichols' *The Law on Eminent Domain* § 5.1[4] (1976).

Using this as an analogy, the question would be whether Jacobson received whatever right to compensation KCLP originally had at the time of the alleged taking. If KCLP had a right which, similar to the right to a condemnation award, was assignable (*See Nichols, supra* § 5.21[3]) it is conceivable that it was assigned to Jacobson. Because the record before us is insufficient to make this determination, we leave this to the district court to which Jacobson may present additional documentation upon remand.

ever, that if the monetary relief issue were decided differently on appeal, the outcome as to the issue of Jacobson's standing would be different.

Assuming, without deciding, that Jacobson did "retain" a sufficient interest to allow him to proceed with his suit, the issue is whether monetary damages are recoverable. We agree with the district judge that the TRPA lacks the power to condemn, without which there can be no compensation for an inverse condemnation under the Fifth Amendment just compensation clause.[30]

Although not entitled to any share of a condemnation award, the question remains whether Jacobson might be entitled to some reduced amount for lost profits or other compensable harm. Although not raised in the district court, the theory behind such a claim would be predicated on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). As previously noted in this opinion, we believe that that rationale of *Bivens* can be extended to cover a Fifth Amendment due process claim such as Jacobson's. This is true even though the action is stated against the TRPA rather than its governing members.

The case for implying a damages remedy is even more compelling in Jacobson's case because there is no meaningful alternative remedy. He has no standing to seek injunctive relief.

Therefore we vacate the district judge's dismissal of Jacobson's complaint and remand for a determination whether, in fact, Jacobson has retained a cause of action upon which his suit can be based and for further proceedings in light of this opinion.

(b) *Jones, et al. v. TRPA,* No. 76—1182.

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30. *See* n. 12 *supra.*

Appellee argues that dismissal of Jones' case is appropriate for failure to establish federal jurisdiction. Such jurisdiction is appropriate only where a substantial federal question appears from a properly pleaded claim. 2 *Moore's Federal Practice* ¶ 2.07[2]. In paragraph one of their complaint, appellants state that jurisdiction is invoked on the same grounds as that invoked by the TRPA in its removal of "a comparable action to the United States District Court for the District of Nevada, Reno . . ." [Clerk's Transcript at 1.] We disapprove of this formulation. The court, from a reading of the complaint, is unable to determine from the pleading the basis for jurisdiction.

It is also necessary for a case to be within the purview of 28 U.S.C. § 1331(a) that a right or immunity created by the Constitution or federal laws be an essential element of plaintiffs' claim. As stated by the Supreme Court in *Gully v. First National Bank in Meridian,* 299 U.S. 109, 112, 57 S.Ct. 96, 97, 81 L.Ed. 70 (1936):

> [A] right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.
> (Citations omitted.)

Appellants' complaint said that the nature of their claims is such that they are under the laws and Constitution of the United States and specifically the Tahoe Regional Planning Compact. They alleged no violations of specific federal Constitutional provisions.

This is not a case where the construction of the Compact provides the needed federal question. *Compare League to Save Lake Tahoe v. TRPA,* 507 F.2d 517 (9th Cir. 1974),

cert. denied, 420 U.S. 974, 95 S.Ct. 1398, 43 L.Ed.2d 654 (1975). The question raised was whether the regulation went too far, *not* whether the TRPA, under the terms of the Compact, had the *power* to regulate.

When the constitutional underpinnings of a claim are not presented in the complaint, the general allegation of jurisdiction is not borne out by a well-pleaded claim. 2A *Moore's Federal Practice* ¶ 8.09[1].[31]

We do not hold that appellants should be denied leave to amend. Fed.R.Civ.Pro. 15 provides for leave to amend once as a matter of right when no responsive pleading has been filed, and otherwise by leave of court when justice so requires. The spirit of the federal rules is that cases should be decided on their merits. Appellants have not acted in bad faith in presenting an inadequate complaint. Therefore, although we do hold that appellants' complaint should be dismissed, the district court should do so with leave to amend.

(c) *Layton-Tahoe Properties v. TRPA, No. 76-1608 and Lake Country Estates, Inc. v. TRPA, No. 76-1289.*

GOODWIN, Circuit Judge:

In *Layton-Tahoe* and *Lake Country Estates* plaintiffs sought injunctive relief in addition to damages, declarative relief, and mandamus. These requests for injunctive relief require additional consideration by this court.[32]

The district court was of the opinion that plaintiffs had stated a claim for inverse condemnation, but dismissed their actions on the sole ground that an action for damages would

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31. The mere fact that a party derives its power under a compact approved by Congress does not provide federal jurisdiction. *Delaware River Joint Toll Bridge Commission v. Stults*, 146 F.Supp. 241 (D.N.J.1956).

32. Jacobson, appellant in No. 75-2400, also requested injunctive relief in his amended complaint but because he has no standing to request such relief (see discussion in Part V a *supra*) we do not discuss his case here.

not lie against a defendant agency that did not have the power of eminent domain.

The court also stated in dicta that, if plaintiffs could establish that TRPA's ordinance constituted a taking of their properties, the ordinance would be treated as action beyond TRPA's authority and held invalid.

Whether plaintiff's property has been diminished in value to such an extent as to constitute a taking is a question of fact to be decided by the trial court and cannot be disposed of on a motion to dismiss on the sole ground that an action for damages does not lie against the defendant.

Even if an agency which has no power to condemn property, and no budget with which to pay for property it may attempt to take, cannot be levied upon in execution of a money judgment for damages, the landowner is not helpless. Although the agency relies upon its empty exchequer to assert that it cannot be held for damages, the agency may yet be subject to an injunction to keep it from doing indirectly that which it cannot do directly. *See Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092 (9th Cir. 1976). It will be for the district court to decide, upon all the facts to be developed at trial, whether or not the agency action constitutes a de facto taking without due process.

An additional problem is created by the unique manner in which Layton-Tahoe's property was rezoned by the TRPA. Appellant's 85 acres of land had been zoned for 240 home sites prior to the adoption of the LUO. The ordinance resulted in 20 of the 85 acres being designated as "Low Density Residential," allowing for a total of 80 home sites. The other 65 acres were rezoned as "General Forest." Thus a unitary piece of property was rezoned in two distinct segments.

Layton-Tahoe claims a $500,000 loss in value as a direct result of the General Forest designation. TRPA answers that it has the power to downzone plaintiff's property from 240 residential lots to 80. Plaintiff concedes that mere downzoning of property is not compensable. *HFH, Ltd. v. Superior Court,* 15 Cal.3d 508, 125 Cal.Rptr. 365, 542 P.2d 237 (1975), *cert. denied,* 425 U.S. 904, 96 S.Ct. 1495, 47 L.Ed.2d 754 (1976). Loss in value alone is insufficient to establish an unconstitutional taking of private property. *Steel Hill Development v. Town of Sanbornton,* 469 F.2d 956, 963 (1st Cir. 1972). When a governmental regulation causes a loss in value of sufficient magnitude, however, the courts recognize the destruction of value as a taking and require compensation.

> • • • We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change • • •

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922).

Whether Layton-Tahoe's property should be treated as a single unit as TRPA contends, or as two separate rezoned segments, is an issue most appropriately passed on initially by the district court. The point at which a taking occurs is a question properly turning upon the particular circumstances of each case. *United States v. Central Eureka Mining Co.,* 357 U.S. 155, 78 S.Ct. 1097, 2 L.Ed.2d 1228 (1958). Upon remand, the district court will have the opportunity to develop facts sufficient to make an appropriate determination.

VI.

CONCLUSION

EUGENE A. WRIGHT, Circuit Judge:

The dismissal of cause No. 75-2400 is vacated and remanded for consideration of whether Jacobson retained any

cause of action upon which suit can be based. If a cause of action has been retained, any further proceedings will depend on the submission of a proper amended complaint which does not request injunctive relief and does not join as parties defendant those parties found to have been properly dismissed. *See* Part IV. *supra.*

The dismissal of cause No. 76-1182 was proper although for reasons different from those given by the district court. We have held that the complaint failed to establish the basis for federal jurisdiction. We will, however, vacate the dismissal, which made no provision for leave to amend, and remand the cause for entry of an order of dismissal for failure to establish federal jurisdiction with leave to amend. Any future complaint should, of course, conform to the directives expressed in this opinion.

The dismissals of causes Nos. 76-1608 & 76-1289 are affirmed in part and reversed in part. The court's dismissal of all claims based on the just compensation provisions of the California and Nevada state constitutions and the federal Constitution are affirmed. Similarly the dismissal of the counties, states, and United States as parties-defendant was proper.

Appellants did state a cause of action for an improper taking of their property under the Fifth Amendment due process clause, however. We therefore reverse the court's dismissal of appellants' complaints for failure to state any claim upon which relief can be granted and the cases are remanded for further consideration of appellants' claims for relief, consistent with this opinion.

These four cases are vacated in part, affirmed in part, reversed in part, and remanded for further consideration.

Appendix D

District Court's Combined Opinion

Civil S-2799

LAKE COUNTRY ESTATES, INC., et al.,
Plaintiffs,

v.

TAHOE REGIONAL PLANNING AGENCY, et al.,
Defendants.

Civil S-2894

GLENRIDGE PARK CO., et al.,
Plaintiffs,

v.

STATE OF CALIFORNIA, et al.,
Defendants.

Civil S-2915

MELVIN F. JONES, et al.,
Plaintiffs,

v.

TAHOE REGIONAL PLANNING AGENCY, et al.,
Defendants.

Civil S-2922

GLENRIDGE PARK CO., et al.,
Plaintiffs,

v.

STATE OF CALIFORNIA, et al.,
Defendants.

Civil S-2944

LAKE TAHOE GOLD MINING CO.
Plaintiff,

v.

TAHOE REGIONAL PLANNING AGENCY, et al.,
Defendants.

Civil S-74-545

NINA PODMORE,
Plaintiff,

v.

TAHOE REGIONAL PLANNING AGENCY, et al.,
Defendants.

Civil No. S-74-547

LAYTON TAHOE PROPERTIES,
Plaintiff,

v.

TAHOE REGIONAL PLANNING AGENCY, et al.,
Defendants.

COMBINED OPINION

In view of the similarity of issues, the above cases will be consolidated for the purposes of this opinion only.

Presently pending are numerous motions to dismiss.

TRPA'S MOTION TO DISMISS.

While the complaints state facts sufficient for a cause of action in inverse condemnation, it is this Court's belief that an inverse condemnation action cannot be brought against TRPA. In *Western International Hotels, et al., v. Tahoe Regional Planning Agency, et al.*, 387 F.Supp. 429 (1975),

the Court found that the Compact, which provides the framework and the powers of the Tahoe Regional Planning Agency, lacks express language as to condemnation powers, and also fails to provide for the necessary funding of such powers or procedures for its exercise. Therefore, the Court concluded that an act of condemnation is beyond the authority of TRPA. In finding that inverse condemnation proceedings cannot be maintained against TRPA, the Court stated:

> "A cause of action for inverse condemnation cannot be asserted against a regulatory body or agency which does not possess the power of eminent domain. Nichols on Eminent Domain, Vol. 2, § 621, Cf. State v. Rank, 293 F.2d 340 (9th Cir. 1961)."

The Court further noted:

> "The cause of action sought to be established by these complaints is, therefore, a cause of action limited to declaratory and injunctive relief against the Land Use Ordinance of TRPA. If plaintiffs should establish that the Land Use Ordinance constitutes a taking of their properties, the Ordinance will be treated as action beyond TRPA authority and held invalid and no cause of action for damages will have been proved."

I concur with *Western International Hotels*.

THEREFORE, IT IS ORDERED that TRPA's motion to dismiss as to a cause of action for inverse condemnation is granted without leave to amend.

COUNTIES' MOTION TO DISMISS.

The counties had no part in enacting the Tahoe Regional Planning Compact. Furthermore, the duty to enforce and finance TRPA actions was forced upon the counties by the

Compact. While TRPA may be an agent of the states, it is clearly not an agent of the counties. Even if a cause of action is made out against TRPA, it will not constitute a cause of action against the counties. *Western International Hotels*, *supra*, at page 438. Therefore, the counties' motions to dismiss are granted.

THE STATES' MOTIONS TO DISMISS.

The Court in *Western International Hotels* also considered the states' involvement in a suit of this kind. The Court concluded:

> "A suit against an arm of the state, whether that arm is an agent or a separate legal entity, alleging action by the arm exceeding its authority 'is not regarded as a suit against the state, since the threatened action, being unauthorized, would not be that of the sovereign.' [Citations omitted]." *Supra*, at p. 439.

Accordingly, the states' motions to dismiss are granted.

INDIVIDUAL DEFENDANTS' MOTIONS TO DISMISS.

Federal courts have long held that members of governmental bodies are immune from liability for damages arising out of their exercise of discretionary functions. *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Dombrowski v. Eastland*, 387 U.S. 82 (1967). Therefore, individual defendants' motions to dismiss are granted.

FEDERAL DEFENDANTS' MOTION TO DISMISS.

TRPA is a separate legal entity and did not become an agency of the United States Government simply by the fact that Congress approved the interstate compact between

Nevada and California. Furthermore, there is insufficient federal involvement or control to hold the United States Government legally responsible for TRPA's actions. I also fail to find any authority which permits the federal defendants to be sued. Therefore, the federal defendants' motion to dismiss is granted.

Done and dated this 11th day of December, 1975.

JAMES F. BATTIN

United States District Judge

Appendix E

Tahoe Regional Planning Compact

Public Law 91-148 [83 Stat. 360]

AN ACT

To grant the consent of the Congress to the Tahoe regional planning compact, to authorize the Secretary of the Interior and others to cooperate with the planning agency thereby created, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to encourage the wise use and conservation of the waters of Lake Tahoe and of the resources of the area around said lake, the consent of the Congress is hereby given to the Tahoe regional planning compact heretofore adopted by the States of California and Nevada, which compact reads as follows:

"TAHOE REGIONAL PLANNING COMPACT

"Article I. Findings and Declarations of Policy

"(a) It is found and declared that the waters of Lake Tahoe and other resources of the Lake Tahoe region are threatened with deterioration or degeneration, which may endanger the natural beauty and economic productivity of the region.

"(b) It is further declared that by virtue of the special conditions and circumstances of the natural ecology, developmental pattern, population distribution, and human needs in the Lake Tahoe region, the region is experiencing problems of resource use and deficiencies of environmental control.

"(c) It is further found and declared that there is a need to maintain an equilibrium between the region's natural en-

dowment and its manmade environment, to preserve the scenic beauty and recreational opportunities of the region, and it is recognized that for the purpose of enhancing the efficiency and governmental effectiveness of the region, it is imperative that there be established an areawide planning agency with power to adopt and enforce a regional plan of resource conservation and orderly development, to exercise effective environmental controls and to perform other essential functions, as enumerated in this title.

"ARTICLE II. DEFINITIONS

"As used in this compact:

"(a) 'Region,' includes Lake Tahoe, the adjacent parts of the Counties of Douglas, Ormsby, and Washoe lying within the Tahoe Basin in the State of Nevada, and the adjacent parts of the Counties of Placer and El Dorado lying within the Tahoe Basin in the State of California, and that additional and adjacent part of the County of Placer outside of the Tahoe Basin in the State of California which lies southward and eastward of a line starting at the intersection of the basin crestline and the north boundary of Section 1, thence west to the northwest corner of Section 3, thence south to the intersection of the basin crestline and the west boundary of Section 10; all sections referring to Township 15 North, Range 16 East, M.D.B.&M. The region defined and described herein shall be as precisely delineated on official maps of the agency.

"(b) 'Agency' means the Tahoe Regional Planning Agency.

"(c) 'Governing body' means the governing board of the Tahoe Regional Planning Agency.

"(d) 'Regional plan' shall mean the long-term general plan for the development of the region.

"(e) 'Interim plan' shall mean the interim regional plan adopted pending the adoption of the regional plan.

"(f) 'Planning commission' means the advisory planning commission appointed pursuant to paragraph (h) of Article III.

"ARTICLE III. ORGANIZATION

"(a) There is created the Tahoe Regional Planning Agency as a separate legal entity.

"The governing body of the agency shall be constituted as follows:

"One member appointed by each of the County Boards of Supervisors of the Counties of El Dorado and Placer and one member appointed by the City Council of the City of South Lake Tahoe. Each member shall be a member of the city council or county board of supervisors which he represents and, in the case of a supervisor, shall be a resident of a county supervisorial district lying wholly or partly within the region.

"One member appointed by each of the boards of county commissioners of Douglas, Ormsby and Washoe counties. Any member so appointed shall be a resident of the county from which he is appointed and may be, but is not required to be:

"(1) A member of the board which appoints him; and

"(2) a resident of or the owner of real property in the region, as each board of county commissioners may in its own discretion determine. The manner of selecting the person so to be appointed may be further prescribed by county ordinance. A person so appointed shall before taking his seat on the governing body disclose all his economic interests in the region, and shall thereafter disclose any further economic interest which he acquires, as soon as feasible

after he acquires it. If any board of county commissioners fails to make an appointment required by this paragraph within 30 days after the effective date of this act or the occurrence of a vacancy on the governing body, the governor shall make such appointment. The position of a member appointed by a board of county commissioners shall be deemed vacant if such member is absent from three consecutive meetings of the governing body in any calendar year.

"One member appointed by the Governor of California and one member appointed by the Governor of Nevada. The appointment of the California member is subject to Senate confirmation; he shall not be a resident of the region and shall represent the public at large. The member appointed by the Governor of Nevada shall not be a resident of the region and shall represent the public at large.

"The Administrator of the California Resources Agency or his designee and the Director of the Nevada Department of Conservation and Natural Resources or his designee.

"(b) The members of the agency shall serve without compensation, but the expenses of each member shall be met by the body which he represents in accordance with the law of that body. All other expenses incurred by the governing body in the course of exercising the powers conferred upon it by this compact unless met in some other manner specifically provided, shall be paid by the agency out of its own funds.

"(c) The term of office of the members of the governing body shall be at the pleasure of the appointing authority in each case, but each appointment shall be reviewed no less often than every 4 years.

"(d) The governing body of the agency shall meet at least monthly. All meetings shall be open to the public to the extent required by the law of the State of California or the

State of Nevada, whichever imposes the greater requirement, applicable to local governments at the time such meeting is held. The governing body shall fix a date for its regular monthly meeting in such terms as 'the first Monday of each month,' and shall not change such date oftener than once in any calendar year. Notice of the date so fixed shall be given by publication at least once in a newspaper or combination of newspapers whose circulation is general throughout the region and in each county a portion of whose territory lies within the region. Notice of any special meeting, except an emergency meeting, shall be given by so publishing the date, place and agenda at least 5 days prior to the meeting.

"(e) The position of a member of the governing body shall be considered vacated upon his loss of any of the qualifications required for his appointment and in such event the appointing authority shall appoint a successor.

"(f) The governing body shall elect from its own members a chairman and vice chairman, whose terms of office shall be two years, and who may be reelected. If a vacancy occurs in either office, the governing body may fill such vacancy for the unexpired term.

"(g) A majority of the members of the governing body from each state shall constitute a quorum for the transaction of the business of the agency. A majority vote of the members present representing each state shall be required to take action with respect to any matter. The vote of each member of the governing body shall be individually recorded. The governing body shall adopt its own rules, regulations and procedures.

"(h) An advisory planning commission shall be appointed by the agency, which shall consist of an equal number of members from each state. The commission shall include but

shall not be limited to: the chief planning officers of Placer County, El Dorado County, and the City of South Lake Tahoe in California and the Counties of Douglas, Ormsby, and Washoe in Nevada, the Placer County Director of Sanitation, the El Dorado County Director of Sanitation, the county health officer of Douglas County or his designee, the county health officer of Washoe County or his designee, the Chief of the Bureau of Environment Health of the Health Division of Department of Health, Welfare and Rehabilitation of the State of Nevada or his designee, the executive officer of the Lahontan Regional Water Quality Control Board or his designee, the executive officer of the Tahoe Regional Planning Agency who shall act as chairman and at least four lay members each of whom shall be a resident of the region.

"(i) The agency shall establish and maintain an office within the region. The agency may rent or own property and equipment. Every plan, ordinance and other record of the agency which is of such nature as to constitute a public record under the law of either the State of California or the State of Nevada shall be open to inspection and copying during regular office hours.

"(j) Each authority charged under this compact or by the law of either state with the duty of appointing a member of the governing body of the agency shall by certified copy of its resolution or other action notify the Secretary of State of its own state of the action taken. Upon receipt of certified copies of the resolutions or notifications appointing the members of the governing body, the Secretary of State of each respective state shall notify the Governor of the state who shall, after consultation with the Governor of the other state, issue a concurrent call for the organization meeting of the governing body at a location determined jointly by the two governors.

"(k) Each state may provide by law for the disclosure or elimination of conflicts of interest on the part of members of the governing body appointed from that state.

"Article IV. Personnel

"(a) The governing body shall determine the qualification of, and it shall appoint and fix the salary of, the executive officer of the agency, and shall employ such other staff and legal counsel as may be necessary to execute the powers and functions provided for under this act or in accordance with any intergovernmental contracts or agreements the agency may be responsible for administering.

"(b) Agency personnel standards and regulations shall conform insofar as possible to the regulations and procedures of the civil service of the State of California or the State of Nevada, as may be determined by the governing body of the agency, and shall be regional and bistate in application and effect; provided that the governing body may, for administrative convenience and at its discretion, assign the administration of designated personnel arrangements to an agency of either state, and provided that administratively convenient adjustments be made in the standards and regulations governing personnel assigned under intergovernmental agreements.

"(c) The agency may establish and maintain or participate in such additional programs of employee benefits as may be appropriate to afford employees of the agency terms and conditions of employment similar to those enjoyed by employees of California and Nevada generally.

"Article V. Planning

"(a) In preparing each of the plans required by this article and each amendment thereto, if any, subsequent to its

adoption, the planning commission after due notice shall hold at least one public hearing which may be continued from time to time, and shall review the testimony and any written recommendations presented at such hearing before recommending the plan or amendment. The notice required by this paragraph shall be given at least 20 days prior to the public hearing by publication at least once in a newspaper or combination of newspapers whose circulation is general throughout the region and in each county a portion of whose territory lies within the region.

"The planning commission shall then recommend such plan or amendment to the governing body for adoption by ordinance. The governing body may adopt, modify or reject the proposed plan or amendment, or may initiate and adopt a plan or amendment without referring it to the planning commission. If the governing body initiates or substantially modifies a plan or amendment, it shall hold at least one public hearing thereon after due notice as required in this paragraph.

"If a request is made for the amendment of the regional plan by:

"(1) a political subdivision a part of whose territory would be affected by such amendment; or

"(2) the owner or lessee of real property which would be affected by such amendment.

the governing body shall complete its action on such amendment within 60 days after such request is delivered to the agency.

"TAHOE REGIONAL PLAN

"(b) Within 15 months after the formation of the agency, the planning commission shall recommend a regional plan. Within 18 months after the formation of the agency, the governing body shall adopt a regional plan. After adoption, the planning commission and governing body shall continuously review and maintain the regional plan. The regional plan shall consist of a diagram, or diagrams, and text, or texts setting forth the projects and proposals for implementation of the regional plan, a description of the needs and goals of the region and a statement of the policies, standards, and elements of the regional plan.

"The regional plan shall include the following correlated elements:

"(1) A land-use plan for the integrated arrangement and general location and extent of, and the criteria and standards for, the uses of land, water, air, space and other natural resources within the region, including but not limited to, an indication or allocation of maximum population densities.

"(2) A transportation plan for the integrated development of a regional system of transportation, including but not limited to, freeways, parkways, highways, transportation facilities, transit routes, waterways, navigation and aviation aids and facilities, and appurtenant terminals and facilities for the movement of people and goods within the region.

"(3) A conservation plan for the preservation, development, utilization, and management of the scenic and other natural resources within the basin, including but not limited to, soils, shoreline and submerged lands, scenic corridors along transportation routes, open spaces, recreational and historical facilities.

"(4) A recreation plan for the development, utilization, and management of the recreational resources of the region, including but not limited to, wilderness and forested lands, parks and parkways, riding and hiking trails,

beaches and playgrounds, marinas and other recreational facilities.

"(5) A public services and facilities plan for the general location, scale and provision of public services and facilities, which, by the nature of their function, size, extent and other characteristics are necessary or appropriate for inclusion in the regional plan.

"In formulating and maintaining the regional plan, the planning commission and governing body shall take account of and shall seek to harmonize the needs of the region as a whole, the plans of the counties and cities within the region, the plans and planning activities of the state, federal and other public agencies and nongovernmental agencies and organizations which affect or are concerned with planning and development within the region. Where necessary for the realization of the regional plan, the agency may engage in collaborative planning with local governmental jurisdictions located outside the region, but contiguous to its boundaries. In formulating and implementing the regional plan, the agency shall seek the cooperation and consider the recommendations of counties and cities and other agencies of local government, of state and federal agencies, of educational institutions and research organizations, whether public or private, and of civic groups and private individuals.

"(c) All provisions of the Tahoe regional general plan shall be enforced by the agency and by the states, counties and cities in the region.

"TAHOE REGIONAL INTERIM PLAN

"(d) Within 60 days after the formation of the agency, the planning commission shall recommend a regional interim plan. Within 90 days after the formation of the

agency, the governing body shall adopt a regional interim plan. The interim plan shall consist of statements of development policies, criteria and standards for planning and development, of plans or portions of plans, and projects and planning decisions, which the agency finds it necessary to adopt and administer on an interim basis in accordance with the substantive powers granted to it in this agreement.

"(e) The agency shall maintain the data, maps and other information developed in the course of formulating and administering the regional plan and interim plan, in a form suitable to assure a consistent view of developmental trends and other relevant information for the availability of and use by other agencies of government and by private organizations and individuals concerned.

"(f) All provisions of the interim plan shall be enforced by the agency and by the states, the counties, and cities.

"ARTICLE VI. AGENCY'S POWERS

"(a) The governing body shall adopt all necessary ordinances, rules, regulations and policies to effectuate the adopted regional and interim plans. Every such ordinance, rule or regulation shall establish a minimum standard applicable throughout the basin, and any political subdivision may adopt and enforce an equal or higher standard applicable to the same subject of regulation in its territory. The regulations shall contain general, regional standards including but not limited to the following: water purity and clarity; subdivision; zoning; tree removal; solid waste disposal; sewage disposal; land fills, excavations, cuts and grading; piers; harbors, breakwaters; or channels and other shoreline developments; waste disposal in shoreline areas; waste disposal from boats; mobile-home parks;

house relocation; outdoor advertising; flood plain protection; soil and sedimentation control; air pollution; and watershed protection. Whenever possible without diminishing the effectiveness of the interim plan or the general plan, the ordinances, rules, regulations and policies shall be confined to matters which are general and regional in application, leaving to the jurisdiction of the respective states, counties and cities the enactment of specific and local ordinances, rules, regulations and policies which conform to the interim or general plan.

"Every ordinance adopted by the agency shall be published at least once by title in a newspaper or combination of newspapers whose circulation is general throughout the region. Except an ordinance adopting or amending the interim plan or the regional plan, no ordinance shall become effective until 60 days after its adoption. Immediately after its adoption, a copy of each ordinance shall be transmitted to the governing body of each political subdivision having territory within the region.

"Interim regulations shall be adopted within 90 days from the formation of the agency and final regulations within 18 months after the formation of the agency.

"Every plan, ordinance, rule, regulation or policy adopted by the agency shall recognize as a permitted and conforming use any business or recreational establishment which is required by law of the state in which it is located to be individually licensed by the state, if such business or establishment:

"(1) Was so licensed on February 5, 1968, or was licensed for a limited season during any part of the calendar year immediately preceding February 5, 1968.

"(2) Is to be constructed on land which was so zoned or designated in a finally adopted master plan on February 5, 1968, as to permit the construction of such a business or establishment.

"(b) All ordinances, rules, regulations and policies adopted by the agency shall be enforced by the agency and by the respective states, counties, and cities. The appropriate courts of the respective states, each within its limits of territory and subject matter provided by state law, are vested with jurisdiction over civil actions to which the agency is a party and criminal actions for violations of its ordinances. Each such action shall be brought in a court of the state where the violation is committed or where the property affected by a civil action is situated, unless the action is brought in a federal court. For this purpose, the agency shall be deemed a political subdivision of both the State of California and the State of Nevada.

"(c) Except as otherwise provided in paragraph (d), all public works projects shall be reviewed prior to construction and approved by the agency as to the project's compliance with the adopted regional general plan.

"(d) All plans, programs and proposals of the State of California or Nevada, or of its executive or administrative agencies, which may substantially affect, or may specifically apply, to the uses of land, water, air, space and other natural resources in the region, including but not limited to public works plans, programs and proposals concerning highway routing, design and construction, shall be referred to the agency for its review, as to conformity with the regional plan or interim plan, and for report and recommendations by the agency to the executive head of the state agency concerned and to the Governor. A public works project which is initiated and is to be constructed by a department of either state shall be submitted to the agency for review and recommendation, but may be constructed as proposed.

"(e) The agency shall police the region to ensure compliance with the general plan and adopted ordinances, rules, regulations and policies. If it is found that the general plan, or ordinances, rules, regulations and policies are not being enforced by a local jurisdiction, the agency may bring action in a court of competent jurisdiction to ensure compliance.

"(f) Violation of any ordinance of the agency is a misdemeanor.

"(g) The agency is hereby empowered to initiate, negotiate and participate in contracts and agreements among the local governmental authorities of the region, or any other intergovernmental contracts or agreements authorized by state or federal law.

"(h) Each intergovernmental contract or agreement shall provide for its own funding and staffing, but this shall not preclude financial contributions from the local authorities concerned or from supplementary sources.

"(i) Whenever a new city is formed within the region, the membership of the governing body shall be increased by two additional members, one appointed by, and who shall be a member of, the legislative body of the new city, and one appointed by the Governor of the state in which the city is not located. A member appointed by the Governor of California is subject to Senate confirmation.

"(j) Every record of the agency, whether public or not, shall be open for examination to the Legislative Analyst of the State of California and the Fiscal Analyst of the State of Nevada.

"(k) Whenever under the provisions of this article or any ordinance, rule, regulation or policy adopted pursuant thereto, the agency is required to review or approve any proposal, public or private, the agency shall take final action, whether to approve, to require modification or to reject such proposal, within 60 days after such proposal is delivered to the agency. If the agency does not take final action within 60 days, the proposal shall be deemed approved.

"Article VII. Finances

"(a) Except as provided in paragraph (e), on or before December 30 of each calendar year the agency shall establish the amount of money necessary to support its activities for the next succeeding fiscal year commencing July 1 of the following year. The agency shall apportion not more than $150,000 of this amount among the counties within the region on the same ratio to the total sum required as the full cash valuation of taxable property within the region in each county bears to the total full cash valuation of taxable property within the region. Each county in California shall pay the sum allotted to it by the agency from any funds available therefor and may levy a tax on any taxable property within its boundaries sufficient to pay the amount so allocated to it. Each county in Nevada shall pay such sums from its general fund or from any other moneys available therefor.

"(b) The agency may fix and collect reasonable fees for any services rendered by it.

"(c) The agency shall be strictly accountable to any county in the region for all funds paid by it to the agency and shall be strictly accountable to all participating bodies for all receipts and disbursements.

"(d) The agency is authorized to receive gifts, donations, subventions, grants, and other financial aids and funds.

"(e) As soon as possible after the ratification of this

compact, the agency shall estimate the amount of money necessary to support its activities:

"(1) For the remainder of the then-current fiscal year; and

"(2) If the first estimate is made between January 1 and June 30, for the fiscal year beginning on July 1 of that calendar year.

The agency shall then allot such amount among the several counties, subject to the restriction and in the manner provided in paragraph (a), and each county shall pay such amount.

"(f) The agency shall not obligate itself beyond the moneys due under this article for its support from the several counties for the current fiscal year, plus any moneys on hand or irrevocably pledged to its support from other sources. No obligation contracted by the agency shall bind either of the party states or any political subdivision thereof.

"ARTICLE VIII. MISCELLANEOUS

"(a) It is intended that the provisions of this compact shall be reasonably and liberally construed to effectuate the purposes thereof. Except as provided in paragraph (c), the provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall

remain in full force and effect as to the remaining state and in full force and effect as to the state affected as to all severable matters.

"(b) The agency shall have such additional powers and duties as may hereafter be delegated or imposed upon it from time to time by the action of the Legislature of either state concurred in by the Legislature of the other.

"(c) A state party to this compact may withdraw therefrom by enacting a statute repealing the compact. Notice of withdrawal shall be communicated officially and in writing to the Governor of the other state and to the agency administrators. This provision is not severable, and if it is held to be unconstitutional or invalid, no other provision of this compact shall be binding upon the State of Nevada or the State of California.

"(d) No provision of this compact shall have any effect upon the allocation or distribution of interstate waters or upon any appropriative water right."

SEC. 2. The Secretary of the Interior and the Secretary of Agriculture are authorized upon request of the Tahoe Regional Planning Agency, to cooperate with said agency in all respects compatible with carrying out the normal duties of their Departments.

SEC. 3. The consent to the compact by the United States is subject to the condition that the President may appoint a nonvoting representative of the United States to the Tahoe regional planning governing board.

SEC. 4. Any additional powers conferred on the agency pursuant to article VIII(b) of the compact shall not be exercised unless consented to by the Congress.

SEC. 5. Nothing contained in this Act or in the compact consented to shall in any way affect the powers, rights, or obligations of the United States, or the applicability of

any law or regulation of the United States in, over, or to the region or waters which are the subject of the compact, or in any way affect rights owned or held by or for Indians or Indian tribes subject to the jurisdiction of the United States.

SEC. 6. The right is hereby reserved by the Congress or any of its standing committees to require the disclosure and furnishing of such information and data by or concerning the Tahoe Regional Planning Agency as is deemed appropriate by the Congress or such committee.

SEC. 7. The right to alter, amend or repeal this Act is expressly reserved.

Approved December 18, 1969.

Appendix F

Excerpts from Briefs of the State of California and the State of Nevada Before the Ninth Circuit Court of Appeals

Brief of Appellee, State of California, August 2, 1976, filed in No. 76-1608, *Layton-Tahoe Properties v. Tahoe Regional Planning Agency, et al.*, pp. 7-9:

"Furthermore, it is plain that TRPA is not a department, division, bureau, board, commission or agency of the State within the meaning of [California Gov't Code § 940.6 defining the "State" for purposes of suit].

"Article III of the compact describes the organization of this agency and specifies at the outset:

> '(a) There is created the Tahoe Regional Planning Agency *as a separate legal entity.*' (Emphasis added)

"The inescapable conclusion of the separate nature of this legal entity is strengthened by an examination of the entire Article III, among others, which sets forth at length how this agency shall be organized and of what its membership shall consist. It is immediately apparent that some of the members are residents of and appointed by the State of Nevada or its political subdivisions and that the two states are equal partners in the formation of this agency—thus it could not be an agency of the State of California. Its existence as a regional agency on equal footing with a district is confirmed by the California Supreme Court in *People ex rel Younger v. County of El Dorado*, 5 Cal.3d 480, at e.g., p. 502 (1971), where the court observes that '. . . [A]ll districts, *including regional agencies such as the present one* [TRPA] are excluded from initiative, referendum and recall provisions . . .' (Emphasis added.)

"The fact that this agency was brought into existence, at least in part, through an act of the California Legislature, makes it no more a California State agency than are the City of Los Angeles or the County of Placer simply because legal authority for their creation and existence lies in State statutes. Indeed such agencies are clearly local public entities within the meaning of Gov. Code Section 940.4, which reads as follows:

> '"Local public entity" includes a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State, but does not include the State.'

"It is clear then that the TRPA is a public agency and thus a 'local public entity' rather than 'the State', and hence it is separate and distinct from the State, rather than being one of its arms, and the State is not a proper party defendant in this case."

• • •

Brief of Appellee, State of Nevada, July 2, 1976, filed in No. 76-1608, *Layton-Tahoe Properties v. Tahoe Regional Planning Agency, et al.*, p. 7:

"The California Supreme Court, in *People ex rel Younger v. County of El Dorado*, 96 Cal.Rptr. 553, 487 p.2d 1193 observed that the TRPA was on an equal legal footing with local political subdivisions such as general improvement districts.

"The fact that the TRPA was created in part by an act of the Nevada Legislature does not make it any more an agency of the State than it is an agency of California or of the United States because of the acts of the California Legislature and the Congress approving the Compact. The counties of Nevada and its incorporated cities are not

agencies of the state merely because they are created or receive their charters by acts of the Legislature. As further evidence that the states and the Congress did not view the TRPA as a state agency is found in Article VII(f) of the Compact 'that no obligations contracted by the agency shall bind either of the party states.'

"Further, and most significant, the State of Nevada has no authority or control whatsoever over the TRPA, its policies, its deliberations, or its actions."

Supreme Court, U. S.
FILED
AUG 21 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1327

LAKE COUNTRY ESTATES, INC., a corporation, COUNTRY CLUB ESTATES, a partnership, and BOULDIN DEVELOPMENT CORPORATION, a corporation,

Petitioners,

vs.

TAHOE REGIONAL PLANNING AGENCY et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Certiorari Filed March 21, 1978
Certiorari Granted June 5, 1978

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

NOTE: The following documents were printed as appendices to the petition for writ of certiorari at the pages listed and are accordingly not reproduced in this Appendix.

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Opinion, Ninth Circuit Court of Appeals, Dec. 21, 1977	1
Order Denying Rehearing, Ninth Circuit Court of Appeals, Jan. 30, 1978	23
Opinion, Ninth Circuit Court of Appeals, Aug. 5, 1977 (withdrawn)	25
Combined Opinion, District Court, Eastern District of California, Dec. 11, 1975	58

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1327

LAKE COUNTRY ESTATES, INC., a corporation, COUNTRY CLUB ESTATES, a partnership, and BOULDIN DEVELOPMENT CORPORATION, a corporation,
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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

April 16, 1973—Complaint filed in U. S. District Court for the Eastern District of California by Plaintiffs Lake Country Estates, Inc. and Country Club Estates.

July 13, 1973—Motion to Dismiss Complaint Filed by Defendant County of El Dorado.

August 1, 1973—Motion to Dismiss Complaint Filed by Defendants Tahoe Regional Planning Agency, John L. Meder, J. Allen Bray, Thomas Stewart, Lester S. Nagy, Charles C. Meneley, Jr., Walter E. MacKenzie, Raymond L. Kniseley, Norman B. Livermore, Jr., Elmo J. DeRicco, James Henry, Doug Leisz, William S. Briner, Jack W. Deinema and Richard M. Heikka.

October 15, 1973—First Amended Complaint Filed by Stipulation by Plaintiffs Lake Country Estates, Inc., Country Club Estates, and Bouldin Development Corporation.

October 15, 1973—Motion to Dismiss Complaint Filed by Defendants Douglas Leisz and Jack Deinema.

November 8, 1973—Amendment to Motion to Dismiss Filed by Defendants James Henry and William S. Briner.

January 4, 1974—Defendants Doug Leisz and Jack W. Deinema Voluntarily Dismissed Without Prejudice.

January 10, 1974—Order of District Court of January 7, 1974, Filed Staying Action Pending Appeal in *League to Save Lake Tahoe v. Tahoe Regional Planning Agency.*

January 28, 1974—Motion to Vacate Stay Filed by Plaintiffs.

March 15, 1974—Order of District Court of March 13, 1974, Filed Denying Plaintiffs' Motion to Vacate Stay.

February 18, 1975—Motion to Vacate Stay Filed by Plaintiffs.

February 26, 1975—Order of District Court of February 24, 1975, Filed Denying Plaintiffs' Motion to Vacate Stay and Continuing Stay Pending Disposition of Petition for Certiorari in *League to Save Lake Tahoe v. Tahoe Regional Planning Agency.*

August 20, 1975 (approx.)—Motions to Dismiss in This and Related Actions set for Hearing by District Court on September 25, 1975.

December 15, 1975—Opinion of District Court Dated December 11, 1975 Filed, Dismissing Complaints in This and Related Actions.

December 16, 1975—Judgment of District Court Entered for Defendants and Against Plaintiffs.

January 6, 1976—Notice of Appeal Filed by Plaintiffs in District Court.

February 9, 1976—Appeal Docketed in Court of Appeals.

September 30, 1976—Order of Court of Appeals Filed Consolidating Actions for Hearing.

August 5, 1977—First Opinion of Court of Appeals Filed and Judgment Entered.

August 19, 1977—Petition for Rehearing Filed by Defendant Tahoe Regional Planning Agency.

December 30, 1977—Second Opinion of Court of Appeals Filed and Judgment Entered as of December 21, 1977.

January 5, 1978—Petition for Rehearing Filed by Plaintiffs.

February 6, 1978—Order of Court of Appeals Filed Denying Petition for Rehearing as of January 30, 1978.

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Lake Country Estates, Inc. and
Bouldin Development Corporation

Original Filed Oct 15 1973
Clerk, U.S. Dist. Court
Eastern District of California

In the United States District Court
For the Eastern District of California

Lake Country Estates, Inc., a corporation; Country Club Estates, a partnership; and Bouldin Development Corporation, a corporation,

Plaintiffs,

vs.

Tahoe Regional Planning Agency, County of El Dorado, State of California, State of Nevada, John L. Meder, J. Allen Bray, Thomas Stewart, Lester S. Nagy, Charles C. Meneley, Jr., Walter E. MacKenzie, Raymond L. Knisely, Norman B. Livermore, Jr., Elmo J. De Ricco, James Henry, Doug Leisz, William S. Briner and Jack W. Deinema, individually and as the Governing Body of the Tahoe Regional Planning Agency; Richard M. Heikka, individually and as Executive Officer of the Tahoe Regional Planning Agency,

Defendants.

Civil No. 82799

First Amended Complaint for Just Compensation and Damages for Taking of Private Property for Public Use; Injunction and Declaratory Relief

Plaintiffs, Lake Country Estates, Inc., Country Club Estates and Bouldin Development Corporation, complain and allege as follows:

JURISDICTION

1. The First and Second Claims for Relief are for just compensation and damages for property taken by defendants for public use without due process of law and without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and in violation of the Tahoe Regional Planning Compact, an interstate compact approved by Congress, and arise under the Fifth and Fourteenth Amendments to the Constitution of the United States and the Tahoe Regional Planning Compact. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars. This Court has jurisdiction of those claims under 28 U.S.C. § 1331.

2. The Seventh and Eighth Claims for Relief are for just compensation and damages to redress the deprivation by defendants Tahoe Regional Planning Agency, Meder, Bray, Stewart, Nagy, Meneley, MacKenzie, Knisely, Livermore, DeRicco, Henry, Leisz, Briner, Deinema and Heikka, under color of state statute, ordinance and regulation, of rights secured to plaintiffs by the Fifth and Fourteenth Amendments to the Constitution of the United States and arise under 42 U.S.C. § 1983. This Court has jurisdiction of those claims under 28 U.S.C. §§ 1331 and 1343.

3. The Ninth and Tenth claims for Relief are for injunctive relief to enjoin defendants from taking plaintiffs' property for public use without due process of law and without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and the Tahoe Regional Planning Compact. The

matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars. This Court has jurisdiction of those claims under 28 U.S.C. § 1331.

4. The Eleventh and Twelfth Claims for Relief are declaratory relief to declare that defendants have taken plaintiffs' property for public use without due process of law and without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution and the Tahoe Regional Planning Compact. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars. This Court has jurisdiction of those claims under 28 U.S.C. §§ 1331 and 2201.

5. The Third, Fourth, Fifth and Sixth Claims for Relief arise out of a common nucleus of operative fact with the First, Second, Seventh, Eighth, Ninth, Tenth, Eleventh and Twelfth Claims for Relief. This Court has pendent jurisdiction of the Third, Fourth, Fifth and Sixth Claims for Relief.

PARTIES

6. Plaintiff Lake Country Estates, Inc. ("Lake Country") is a corporation in good standing incorporated under the laws of the State of California.

7. Plaintiff Country Club Estates ("Country Club") is a partnership with its principal place of business in San Francisco, California.

8. Plaintiff Bouldin Development Corporation ("Bouldin") is a corporation in good standing incorporated under the laws of the State of California.

9. Defendant Tahoe Regional Planning Agency is a separate legal entity existing under and by virtue of the Tahoe Regional Planning Compact, an interstate compact executed between the States of Nevada and California and

approved by Congress, and is a political subdivision of both defendant State of California and defendant State of Nevada.

10. Defendant County of El Dorado is a county and political subdivision of the State of California, duly organized and existing under the laws of the State of California.

11. Defendant State of California is a sovereign state of the United States of America.

12. Defendant State of Nevada is a sovereign state of the United States of America.

13. Defendant John L. Meder is, and at times relevant hereto was, the Chairman of the Governing Body of defendant Tahoe Regional Planning Agency. Defendant J. Allen Bray is, and at all times relevant hereto was, a member of said Governing Body, and was the Chairman of said Governing Body prior to the time that defendant John L. Meder assumed that position. At all times relevant hereto, either defendant Meder or defendant Bray was the Chairman of said Governing Body. Defendants Thomas Stewart, Lester S. Nagy, Charles C. Meneley, Jr., Walter E. MacKenzie, Raymond L. Knisely, Norman B. Livermore, Jr., and Elmo J. DeRicco are, and at all times relevant hereto were, members of said Governing Body. Defendants James Henry and Doug Leisz are, and at times relevant hereto were, members of said Governing Body. Defendants William S. Briner and Jack W. Deinema were at times relevant hereto members of said Governing Body. Defendant Richard M. Heikka is, and at all times relevant hereto was, the Executive Officer of defendant Tahoe Regional Planning Agency. Said defendants were the officers and agents of defendant Tahoe Regional Planning Agency in connection with all matters alleged in this complaint, and all actions of defendant Tahoe Regional Planning Agency alleged in

this complaint were performed by and through said defendants.

FIRST CLAIM FOR RELIEF

14. Plaintiffs reallege and incorporate herein by reference paragraphs 1, 6 and 8 through 13.

15. Plaintiff Lake Country is, and at all times material hereto was, the owner of certain real property (the "Lake Country property") located in the County of El Dorado, State of California, and in the Lake Tahoe Region as defined in Section 66801 of the California Government Code, as more particularly described in Exhibit A to this complaint which is incorporated herein by this reference.

16. Bouldin is, and at all times material hereto was, the beneficiary of a deed of trust (the "Deed of Trust") of a portion of the Lake Country property. The Deed of Trust secures a purchase money promissory note in the amount of Six Million Ninety-nine Thousand Nine Hundred Dollars ($6,099,900). The trustor of the Deed of Trust is plaintiff Lake Country.

17. On or about April 9, 1971, plaintiff Lake Country submitted a master plan to defendant County of El Dorado for the development of the Lake Country property for multiple residential and related uses. On or about June 1, 1971, defendant County of El Dorado approved that master plan. In accordance with that approval, plaintiff Lake Country was entitled to develop and improve the Lake Country property for multiple residential and related uses.

18. On or about July 7, 1971, plaintiff Lake Country presented that master plan to the Advisory Planning Commission of defendant Tahoe Regional Planning Agency. The Advisory Planning Commission approved the master plan on or about July 7, 1971.

19. On or about February 10, 1972, defendant Tahoe Regional Planning Agency adopted a Land Use Ordinance (the "Ordinance") and General Plan (the "Plan") which became effective on April 10, 1972. Pursuant to the Ordinance and the Plan portions of the Lake Country property were classified "general forest" and substantially all of the remainder was classified "conservation reserve."

20. Under the terms of the Ordinance and Plan and as a result of them, all beneficial use or development of the Lake Country property was prohibited and prevented.

21. After the enactment of the Ordinance and Plan, plaintiff Lake Country again applied to defendant Tahoe Regional Planning Agency to approve the master plan for development of the Lake Country property for multiple residential and related uses and presented all relevant facts to support its application. On or about October 12, 1972, the Governing Board of defendant Tahoe Regional Planning Agency, without any foundation in fact or law, rejected the application and made an order with respect causing all of the Lake Country property to be classified "conservation reserve."

22. As a result of this refusal to approve plaintiff Lake Country's application and this order, all beneficial use or development of the Lake Country property was prohibited and prevented, as it had been since the Ordinance and Plan became effective.

23. Defendant Tahoe Regional Planning Agency has announced, by and through its agents, its intention to acquire the Lake Country property, but it has failed to institute condemnation proceedings or to pay plaintiffs Lake Country and Bouldin just compensation for their property. Defendant Tahoe Regional Planning Agency has also failed and refused to give timely or proper considera-

tion to plaintiff Lake Country's applications with respect to development of the Lake Country property, and has rendered futile the making of any such applications. Plaintiffs Lake Country and Bouldin are informed and believe, and on that ground allege, that defendant Tahoe Regional Planning Agency has intentionally refused to give timely or proper consideration to plaintiff Lake Country's applications with respect to development of the Lake Country property in order to prevent and frustrate applications to develop and development of the Lake Country property and in order to destroy all economic value or use of the Lake Country property and to take that property for public use without instituting condemnation proceedings and without paying plaintiffs Lake Country and Bouldin just compensation for their property.

24. By enacting and implementing the Ordinance and Plan, rejecting plaintiff Lake Country's applications, announcing its intention to acquire the Lake Country property, failing and refusing to give timely and proper consideration to plaintiff Lake Country's applications and by thereby prohibiting and preventing all beneficial use or development of the Lake Country property, defendant Tahoe Regional Planning Agency, and defendants County of El Dorado, the State of California and the State of Nevada acting through the Tahoe Regional Planning Agency, have arbitrarily, capriciously, unreasonably, discriminatorily and unlawfully destroyed all economic value or use of the Lake Country property and have taken the property for public use without due process of law and without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and the Tahoe Regional Planning Compact as approved by Congress.

25. The fair market value of the Lake Country property at the time of said taking was Thirteen Million Two Hundred Fifty Thousand Dollars ($13,250,000).

26. As a proximate result of said arbitrary, capricious, unreasonable, discriminatory and unlawful destruction of all economic value and use of the Lake Country property and of that taking of that Lake Country property for public use without due process of law and without just compensation, plaintiff Lake Country has been injured in the amount of Thirteen Million Two Hundred Fifty Thousand Dollars ($13,250,000).

27. As a proximate result of said arbitrary, capricious, unreasonable, discriminatory and unlawful destruction of all economic value and use of the Lake Country property and of that taking of that Lake Country property for public use without due process of law and without just compensation, Bouldin has been injured in the amount of Six Million Ninety-nine Thousand Nine Hundred Dollars ($6,099,900) by virtue of the destruction of the value of Bouldin's security under the Deed of Trust and because under the terms of the Deed of Trust Bouldin is entitled to any and all award of damages in connection with the condemnation for public use of or injury to the Lake Country property or any part of it.

28. On or about October 6, 1972, plaintiff Lake Country presented a claim in the amount of Thirteen Million Two Hundred Fifty Thousand Dollars ($13,250,000) to defendants Tahoe Regional Planning Agency, County of El Dorado, State of California and State of Nevada for the damages sought against these defendants in this action.

29. Defendant County of El Dorado rejected said claim in its entirety on or after October 17, 1972 and delivered or deposited in the mail written notice of its rejection of

the claim on or after October 18, 1972. Defendant Tahoe Regional Planning Agency rejected said claim in its entirety on or after October 25, 1972 and delivered or deposited in the mail written notice of its rejection of the claim on or after November 2, 1972. Defendant State of California rejected said claim on or after November 9, 1972 and delivered or deposited in the mail written notice of its rejection on or after November 9, 1972. Defendant State of Nevada rejected said claim in its entirety on or after November 3, 1972.

30. On or about April 7, 1973, plaintiff Bouldin presented a claim in the amount of Six Million Ninety-nine Thousand Nine Hundred Dollars ($6,099,900) to defendants Tahoe Regional Planning Agency, County of El Dorado, State of California and State of Nevada for the damages sought against these defendants in this action.

31. Defendant El Dorado County rejected said claim in its entirety on or after April 17, 1973 and delivered or deposited in the mail written notice of its rejection of the claim on or after April 18, 1973. Defendant Tahoe Regional Planning Agency rejected said claim in its entirety on or after May 24, 1973 and delivered or deposited in the mail written notice of its rejection of the claim on or after May 31, 1973. Defendant State of California rejected said claim in its entirety on or after April 30, 1973 and delivered or deposited in the mail written notice of its rejection of the claim on or after April 30, 1973. Defendant State of Nevada rejected said claim in its entirety on or after May 16, 1973.

SECOND CLAIM FOR RELIEF

32. Plaintiffs reallege and incorporate herein by this reference the allegations of paragraphs 1 and 8 through 13.

33. Plaintiff Country Club is the owner of certain real property (the "Country Club property") located in the County of El Dorado, State of California, and in the Lake Tahoe Region as defined in Section 66801 of the California Government Code, as more particularly described in Exhibit B to this complaint which is incorporated herein by this reference.

34. On or about April 9, 1972 plaintiff Country Club submitted a master plan to defendant County of El Dorado for the development of the Country Club property for multiple residential, country club and commercial purposes. On or about June 1, 1971, defendant County of El Dorado approved that master plan. In accordance with that approval, plaintiff Country Club was entitled to develop and improve the Country Club property for multiple residential, country club and commercial uses.

35. On or about July 7, 1971, plaintiff Country Club presented that master plan to the Advisory Planning Commission of defendant Tahoe Regional Planning Agency. The Advisory Planning Commission approved the master plan on or about July 7, 1971.

36. On or about February 10, 1972, defendant Tahoe Regional Planning Agency adopted a Land Use Ordinance (the "Ordinance") and General Plan (the "Plan") which became effective on April 10, 1972. Pursuant to the Ordinance and the Plan portions of the Country Club property were classified "general forest" and the remainder was classified "conservation reserve".

37. Under the terms of that Ordinance and Plan and as a result of them, all beneficial use or development of the Country Club property was prohibited and prevented.

38. After the enactment of the Ordinance and Plan, plaintiff Country Club again applied to defendant Tahoe

Regional Planning Agency to approve the master plan for development of the property for multiple residential, country club and commercial uses and presented all relevant facts to support its application. On or about October 12, 1972, the Governing Body of defendant Tahoe Regional Planning Agency, without any foundation in fact or law, rejected the application and made an order with respect to causing all of the Country Club property to be classified "conservation reserve".

39. As a result of this refusal to approve plaintiff Country Club's application and this order, all beneficial use or development of the Country Club property was prohibited and prevented, as it had been since the Ordinance and Plan became effective.

40. Defendant Tahoe Regional Planning Agency has announced, by and through its agents, its intention to acquire the Country Club property, but it has failed to institute condemnation proceedings or to pay plaintiff Country Club just compensation for its property. Defendant Tahoe Regional Planning Agency has also failed and refused to give timely or proper consideration to plaintiff Country Club's applications with respect to development of Country Club property, and has rendered futile the making of any such applications. Plaintiff Country Club is informed and believes, and on that ground alleges, that defendant Tahoe Regional Planning Agency has intentionally refused to give timely or proper consideration to plaintiff Country Club property in order to prevent and frustrate applications to develop and development of the Country Club property and in order to destroy all economic value or use of the Country Club property and to take that property for public use without instituting condemnation proceedings and without paying plaintiff Country Club just compensation for its property.

41. By enacting and implementing the Ordinance and Plan, rejecting plaintiff Country Club's applications, announcing its intention to acquire the Country Club property, failing and refusing to give timely and proper consideration to plaintiff Country Club's applications and by thereby prohibiting and preventing all beneficial use and development of the Country Club property, defendant Tahoe Regional Planning Agency, and defendants County of El Dorado, State of California and State of Nevada acting through defendant Tahoe Regional Planning Agency, have arbitrarily, capriciously, unreasonably, discriminatorily and unlawfully destroyed all economic value or use of the Country Club property and have taken the property for public use without due process of law and without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and the Tahoe Regional Planning Compact as approved by Congress.

42. The fair market value of the Country Club property at the time of said taking was Twelve Million Five Hundred Fifty Thousand Dollars ($12,550,000).

43. As a proximate result of said arbitrary, capricious, unreasonable, discriminatory and unlawful destruction of all economic value and use of the Country Club property and of that taking of that Country Club property for public use without due process of law and without just compensation, plaintiff Country Club has been injured in the amount of Twelve Million Five Hundred and Fifty Thousand Dollars ($12,550,000).

44. On or about October 6, 1972, plaintiff Country Club presented a claim in the amount of Twelve Million Five Hundred Fifty Thousand Dollars ($12,550,000) to defend-

ants Tahoe Regional Planning Agency, State of California, State of Nevada and County of El Dorado for the damages sought against these defendants in this action.

45. Defendant County of El Dorado rejected said claim in its entirety on or about October 17, 1972, and delivered or deposited in the mail written notice of its rejection of the claim on or after October 18, 1972. Defendant Tahoe Regional Planning Agency rejected said claim in its entirety on or after October 25, 1972, and delivered or deposited in the mail written notice of its rejection of the claim on or after November 2, 1972. Defendant State of California rejected said claim on or after November 9, 1972 and delivered or deposited in the mail written notice of its rejection on or after November 9, 1972. Defendant State of Nevada rejected said claim in its entirety on November 3, 1972.

THIRD CLAIM FOR RELIEF

46. Plaintiffs reallege and incorporate herein by this reference paragraphs 1 through 6 and 8 through 13 and paragraphs 15 through 23 and 25 through 31 of the First Claim for Relief.

47. By enacting and implementing the Ordinance and Plan, rejecting plaintiff Lake Country's applications, announcing its intention to acquire the Lake Country property, failing and refusing to give timely and proper consideration to plaintiff Lake Country's applications, and by thereby prohibiting and preventing all beneficial use or development of the Lake Country property, defendant Tahoe Regional Planning Agency, and defendants County of El Dorado and the State of California acting through the Tahoe Regional Planning Agency, have arbitrarily, capriciously, unreasonably, discriminatorily and unlawfully

destroyed all economic value or use of the Lake Country property and have taken the property for public use without due process of law and without just compensation in violation of the Constitution and laws of the State of California.

FOURTH CLAIM FOR RELIEF

48. Plaintiffs reallege and incorporate herein by this reference paragraphs 1 through 6 and 8 through 13 and paragraphs 15 through 23 and 25 through 31 of the First Claim for Relief.

49. By enacting and implementing the Ordinance and Plan, rejecting plaintiff Lake Country's applications, announcing its intention to acquire the Lake Country property, failing and refusing to give timely and proper consideration to plaintiff Lake Country's applications, and by thereby prohibiting and preventing all beneficial use or development of the Lake Country property, defendant Tahoe Regional Planning Agency, and defendant State of Nevada acting through the Tahoe Regional Planning Agency, have arbitrarily, capriciously, unreasonably, discriminatorily and unlawfully destroyed all economic value or use of the Lake Country property and have taken the property for public use without due process of law and without just compensation in violation of the Constitution and laws of the State of Nevada.

FIFTH CLAIM FOR RELIEF

50. Plaintiffs reallege and incorporate herein by this reference paragraphs 1 through 5, 7 and 9 through 13 and paragraphs 33 through 40 and 42 through 45 of the Second Claim for Relief.

51. By enacting and implementing the Ordinance and Plan, rejecting plaintiff Country Club's applications, an-

nouncing its intention to acquire the Country Club property, failing and refusing to give timely and proper consideration to plaintiff Country Club's applications, and by thereby prohibiting and preventing all beneficial use or development of the Country Club property, defendant Tahoe Regional Planning Agency, and defendants County of El Dorado and the State of California acting through the Tahoe Regional Planning Agency, have arbitrarily, capriciously, unreasonably, discriminatorily and unlawfully destroyed all economic value or use of the Country Club property and have taken the property for public use without due process of law and without just compensation in violation of the Constitution and laws of the State of California.

SIXTH CLAIM FOR RELIEF

52. Plaintiffs reallege and incorporate herein by this reference paragraphs 1 through 5, 7 and 9 through 13 and paragraphs 33 through 40 and 42 through 45 of the Second Claim for Relief.

53. By enacting and implementing the Ordinance and Plan, rejecting plaintiff Country Club's applications, announcing its intention to acquire the Country Club property, failing and refusing to give timely and proper consideration to plaintiff Country Club's applications, and by thereby prohibiting and preventing all beneficial use or development of the Country Club property, defendant Tahoe Regional Planning Agency, and defendant State of Nevada acting through the Tahoe Regional Planning Agency, have arbitrarily, capriciously, unreasonably, discriminatorily and unlawfully destroyed all economic value or use of the Country Club property and have taken the property for public use without due process of law and without just compensation in violation of the Constitution and laws of the State of Nevada.

SEVENTH CLAIM FOR RELIEF

54. Plaintiffs reallege and incorporate herein by this reference paragraphs 2, 6, and 8 through 13, and paragraphs 15 through 23 and 25 through 31 of the First Claim for Relief.

55. Defendants Tahoe Regional Planning Agency, Meder, Bray, Stewart, Nagy, Meneley, MacKenzie, Knisely, Livermore, DeRicco, Henry, Leisz, Briner, Deinema and Heikka have, under color of state statutes and under color of the ordinances, regulations, plans, enactments and orders of the Tahoe Regional Planning Agency, enacted and implemented the Ordinance and Plan, rejected plaintiff Lake Country's applications, announced their intention to acquire the Lake Country property, failed and refused to give timely and proper consideration to plaintiff Lake Country's applications and prohibited and prevented all beneficial use or development of the Lake Country property. Said defendants have thereby arbitrarily, capriciously, unreasonably, discriminatorily and unlawfully destroyed all economic value or use of the Lake Country property and have taken the property for public use without due process of law and without just compensation.

56. Said defendants have thereby under color of state statute, ordinance and regulation, deprived plaintiffs Lake Country and Bouldin, and each of them, of rights secured to them, and each of them, by the Fifth and Fourteenth Amendments to the Constitution and the laws of the United States.

EIGHTH CLAIM FOR RELIEF

57. Plaintiffs reallege and incorporate herein by this reference paragraphs 2, 7 and 9 through 12 and paragraphs 33 through 40 and 42 through 45 of the Second Claim for Relief.

58. Defendants Tahoe Regional Planning Agency, Meder, Bray, Stewart, Nagy, Meneley, MacKenzie, Knisely, Livermore, DeRicco, Henry, Leisz, Briner, Deinema and Heikka have, under color of state statutes and under color of the ordinances, regulations, plans, enactments and orders of the Tahoe Regional Planning Agency, enacted and implemented the Ordinance and Plan, rejected plaintiff Country Club's applications, announced their intention to acquire the Country Club property, failed and refused to give timely and proper consideration to plaintiff Country Club's applications, and prohibited and prevented all beneficial use or development of the Country Club property. Said defendants have thereby arbitrarily, capriciously, unreasonably, discriminatorily and unlawfully destroyed all economic value or use of the Country Club property and have taken the property for public use without due process of law and without just compensation.

59. Said defendants have thereby, under color of state statute, ordinance and regulation, deprived plaintiff Country Club of rights secured to it by the Fifth and Fourteenth Amendments to the Constitution and the laws of the United States.

NINTH CLAIM FOR RELIEF

60. Plaintiffs reallege and incorporate herein by this reference paragraphs 3, 6 and 8 through 13 and paragraphs 15 through 26 of the First Claim for Relief and paragraphs 55 and 56 of the Seventh Claim for Relief.

61. Plaintiffs Lake Country and Bouldin are informed and believe, and on that ground allege, that defendants Tahoe Regional Planning Agency, Meder, Bray, Stewart, Nagy, Meneley, MacKenzie, Knisely, Livermore, DeRicco, Henry, Leisz, Briner, Deinema and Heikka are insolvent

or otherwise unable to respond in damages adequate to compensate plaintiffs Lake Country and Bouldin for the injuries they, and each of them, have sustained. For this reason and on the basis of the facts alleged above, the aforesaid arbitrary, capricious, unreasonable, discriminatory and unlawful destruction of all economic value and use of the Lake Country property and taking of the Lake Country property for public use without due process of law and without just compensation will cause plaintiffs Lake Country and Bouldin great and irreparable injury for which they have no adequate remedy at law.

TENTH CLAIM FOR RELIEF

62. Plaintiffs reallege and incorporate herein by this reference paragraphs 3, 7 and 9 through 13 and paragraphs 33 through 43 of the Second Claim for Relief and paragraphs 58 and 59 of the Eighth Claim for Relief.

63. Plaintiff Country Club is informed and believes, and on that ground alleges, that defendants Tahoe Regional Planning Agency, Meder, Bray, Stewart, Nagy, Meneley, MacKenzie, Knisely, Livermore, DeRicco, Henry, Leisz, Briner, Deinema and Heikka are insolvent or otherwise unable to respond in damages adequate to compensate plaintiff Country Club for the injuries it has sustained. For this reason and on the basis of the facts alleged above, the aforesaid arbitrary, capricious, unreasonable, discriminatory and unlawful destruction of all economic value and use of the Country Club property and taking of the Country Club property for public use without due process of law and without just compensation will cause plaintiff Country Club great and irreparable injury for which it has no adequate remedy at law.

ELEVENTH CLAIM FOR RELIEF

64. Plaintiff realleges and incorporates herein by this reference paragraphs 4, 6 and 9 through 13 and paragraphs 15 through 24 of the First Claim for Relief.

65. An actual controversy has arisen and now exists between plaintiffs Lake Country and Bouldin and defendants relating to their respective legal rights in that plaintiffs Lake Country and Bouldin contend that defendants have arbitrarily, capriciously, unreasonably, discriminatorily and unlawfully destroyed all economic value or use of the Lake Country property and have taken the property for public use without due process of law and without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States; whereas, defendants dispute such contentions and contend that they have not arbitrarily, capriciously, unreasonably, discriminatorily or unlawfully destroyed all economic value or use of the Lake Country property and have not taken the property for public use without due process of law and without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

66. Plaintiffs Lake Country and Bouldin desire a declaration of their rights with respect to the aforesaid matter, and such a declaration is necessary and appropriate at this time in order that plaintiffs Lake Country and Bouldin may ascertain their rights.

TWELFTH CLAIM FOR RELIEF

67. Plaintiffs reallege and incorporate herein by this reference paragraphs 4, 7 and 9 through 13 and paragraphs 33 through 41 of the Second Claim for Relief.

68. An actual controversy has arisen and now exists between plaintiff Country Club and defendants relating to

their respective legal rights in that plaintiff Country Club contends that defendants have arbitrarily, capriciously, unreasonably, discriminatorily and unlawfully destroyed all economic value or use of the Country Club property and have taken the property for public use without due process of law and without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States; whereas, defendants dispute such contentions and contend that they have not arbitrarily, capriciously, unreasonably, discriminatorily or unlawfully destroyed all economic value or use of the Country Club property and have not taken the property for public use without due process of law and without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

69. Plaintiff Country Club desires a declaration of its rights with respect to the aforesaid matter, and such a declaration is necessary and appropriate at this time in order that plaintiff Country Club may ascertain its rights.

Wherefore, plaintiffs pray:

1. That plaintiff Lake Country have judgment in its favor in the amount of Thirteen Million Two Hundred Fifty Thousand Dollars ($13,250,000), plus interest, under the First Claim for Relief;

2. That plaintiff Bouldin have judgment in its favor in the amount of Six Million Ninety-nine Thousand Nine Hundred Dollars ($6,099,900), plus interest, under the First Claim for Relief;

3. That plaintiff Country Club have judgment in its favor in the amount of Twelve Million Five Hundred Fifty Thousand Dollars ($12,550,000), plus interest, under the Second Claim for Relief;

4. That plaintiff Lake Country have judgment in its favor in the amount of Thirteen Million Two Hundred Fifty Thousand Dollars ($13,250,000), plus interest, under the Third Claim for Relief;

5. That plaintiff Bouldin have judgment in its favor in the amount of Six Million Ninety-nine Thousand Nine Hundred Dollars ($6,099,900), plus interest, under the Third Claim for Relief;

6. That plaintiff Lake Country have judgment in its favor in the amount of Thirteen Million Two Hundred Fifty Thousand Dollars ($13,250,000), plus interest, under the Fourth Claim for Relief;

7. That plaintiff Bouldin have judgment in its favor in the amount of Six Million Ninety-nine Thousand Nine Hundred Dollars ($6,099,900), plus interest, under the Fourth Claim for Relief;

8. That plaintiff Country Club have judgment in its favor in the amount of Twelve Million Five Hundred Fifty Thousand Dollars ($12,550,000), plus interest, under the Fifth Claim for Relief;

9. That plaintiff Country Club have judgment in its favor in the amount of Twelve Million Five Hundred Fifty Thousand Dollars ($12,550,000), plus interest, under the Sixth Claim for Relief;

10. That plaintiff Lake Country have judgment in its favor in the amount of Thirteen Million Five Hundred Fifty Thousand Dollars ($13,550,000), plus interest, against defendants Tahoe Regional Planning Agency, Meder, Bray, Stewart, Nagy, Meneley, MacKenzie, Knisely, Livermore, DeRicco, Henry, Leisz, Briner, Deinema and Heikka under the Seventh Claim for Relief;

11. That plaintiff Bouldin have judgment in its favor in the amount of Six Million Ninety-nine Thousand Nine Hundred Dollars ($6,099,900), plus interest, against defendants Tahoe Regional Planning Agency, Meder, Bray, Stewart, Nagy, Meneley, MacKenzie, Knisely, Livermore, DeRicco, Henry, Leisz, Briner, Deinema and Heikka under the Seventh Claim for Relief;

12. That plaintiff Country Club have judgment in its favor in the amount of Twelve Million Five Hundred Fifty Thousand Dollars ($12,550,000), plus interest, against defendants Tahoe Regional Planning Agency, Meder, Bray, Stewart, Nagy, Meneley, MacKenzie, Knisely, Livermore, DeRicco, Henry, Leisz, Briner, Deinema and Heikka under the Eighth Claim for Relief;

13. That defendants, and their officers, agents, servants, employees, attorneys, and all persons acting in concert or participation with them or any of them, and all persons, firms, corporations, public agencies or public entities who receive actual notice of this action by personal service or otherwise, and each of them, be preliminarily and permanently enjoined and restrained under the Ninth Claim for Relief:

(a) from classifying the Lake Country property as "general forest" or "conservation reserve" under the Ordinance and Plan or otherwise implementing, enforcing or applying the Ordinance or Plan as to the Lake Country property so as to prohibit or prevent the beneficial use or development of the property;

(b) from failing to approve plaintiff Lake Country's master plan for development of the Lake Country property for multiple residential and related uses;

(c) from otherwise arbitrarily, capriciously, unreasonably, discriminatorily or unlawfully destroying the economic value or use of the Lake Country property and taking the Lake Country property for public use

without due process of law and without paying just compensation to plaintiffs Lake Country and Bouldin;

14. That defendants, and their officers, agents, servants, employees, attorneys and all persons acting in concert or participation with them or any of them, and all persons, firms, corporations, public agencies or public entities who receive actual notice of this action by personal service or otherwise, and each of them, be preliminarily and permanently enjoined and restrained under the Tenth Claim for Relief:

(a) from classifying the Country Club property as "general forest" or "conservation reserve" under the Ordinance and Plan or otherwise implementing, enforcing or applying the Ordinance and Plan as to the Country Club property so as to prohibit or prevent the beneficial use and development of the property;

(b) from failing to approve plaintiff Country Club's master plan for development of the Country Club property for multiple residential, golf course and commercial uses;

(c) from otherwise arbitrarily, capriciously, unreasonably, discriminatorily or unlawfully destroying the economic value or use of the Country Club property and taking the Country Club property for public use without due process of law and without paying just compensation to plaintiff Country Club;

15. That the Court declare the respective rights of plaintiffs Lake Country and Bouldin and defendants and in particular declare that by classifying the Lake Country property as "general forest" or "conservation reserve" under the Ordinance and Plan or otherwise implementing, enforcing or applying the Ordinance or Plan as to the Lake

Country property so as to prohibit or prevent the beneficial use or development of the property; by failing to approve plaintiff Lake Country's master plan for development of the Lake Country property for multiple residential and related uses; and by failing or refusing to give timely and proper consideration to plaintiff Lake Country's applications with respect to development of the Lake Country property; defendants have arbitrarily, capriciously, unreasonably, discriminatorily and unlawfully destroyed the economic value or use of the Lake Country property and have taken the Lake Country property for public use without due process of law and without paying just compensation to plaintiffs Lake Country and Bouldin in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, and are liable to plaintiffs Lake Country and Bouldin for the damages they, and each of them, have incurred as a result thereof;

16. That the Court declare the respective rights of plaintiff Country Club and defendants and in particular declare that by classifying the Country Club property as "general forest" or "conservation reserve" under the Ordinance or otherwise implementing, enforcing or applying the Ordinance and Plan as to the Country Club property so as to prohibit or prevent the beneficial use and development of the property; by failing to approve plaintiff Country Club's master plan for development of the Country Club property for multiple residential, golf course and commercial uses; and by failing or refusing to give timely and proper consideration to plaintiff Country Club's applications with respect to development of the Country Club property; defendants have arbitrarily, capriciously, unreasonably, discriminatorily and unlawfully destroyed the economic value or use of the Country Club property and have

taken the Country Club property for public use without due process of law and without paying just compensation to plaintiff Country Club, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, and are liable to plaintiff Lake Country for the damages it has incurred as a result thereof;

17. That plaintiffs recover their costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees, incurred in or because of this action;

18. That plaintiffs have such other and further relief as the Court may deem proper.

Dated: September 28, 1973

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By /s/ JOHN J. BARTKO
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and Bouldin Development
Corporation

JUN 1 PAGE 2

In the Supreme Court of the United States

Supreme Court, U. S.
FILED
APR 19 1978
MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1977

No. 77-1327

LAKE COUNTRY ESTATES, INC., a corporation, COUNTRY CLUB ESTATES, a partnership, and BOULDIN DEVELOPMENT CORPORATION, a corporation,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, COUNTY OF EL DORADO, and STATE OF CALIFORNIA, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondent State of California in Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. .....

LAKE COUNTRY ESTATES, INC., a corporation, COUNTRY CLUB ESTATES, a partnership, and BOULDIN DEVELOPMENT CORPORATION, a corporation,

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, COUNTY OF EL DORADO, and STATE OF CALIFORNIA, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondent State of California in Opposition

OPINIONS BELOW

The opinions of the lower courts are adequately referenced in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Does the Tahoe Regional Planning Compact have the effect of waiving the protection of the Eleventh Amendment when that compact does not in any reasonable manner indicate that the states intended to waive the Eleventh Amendment or that Congress intended to abrogate Eleventh Amendment immunities.[1]

STATEMENT OF THE CASE

California adopts and incorporates the statement of the case set forth in the opposition brief of the Tahoe Regional Planning Agency. It should be noted that California was a named party in the action filed by petitioners in the federal district court but California has never been served in that action. However, California was named and served in two of the other cases involved in the consolidated opinion of the Ninth Circuit Court of Appeals. *Jones v. Tahoe Regional Planning Agency* (United States Court of Appeals for the Ninth Circuit No. 76-1182) and *Layton-Tahoe Properties v. Tahoe Regional Planning Agency* (United States Court of Appeals for the Ninth Circuit No. 76-1608). The States of California and Nevada were dismissed from these actions by the Ninth Circuit. *Jacobson v. Tahoe Regional Planning Agcy.* (9th Cir. 1977) 566 F.2d 1353, 1361-1362. California has an interest in the outcome of the Petition to the extent that waiver of the Eleventh Amendment is an issue.

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1. The other issues which have been raised by petitioners will be addressed in the oppositions of the Tahoe Regional Planning Agency and the individual respondents.

ARGUMENT

I. THE ELEVENTH AMENDMENT HAS NOT BEEN WAIVED BY THE ADOPTION OR ACCEPTANCE OF THE TAHOE REGIONAL PLANNING COMPACT.

A. The Conclusion Reached by the Ninth Circuit Court of Appeals Is Correct.

Petitioners argue that the immunity from suit accorded by the Eleventh Amendment has been waived by the adoption and acceptance of the Tahoe Regional Planning Compact. Petition for Writ of Certiorari at pp. 23-25. This argument is premised on an attempt to analogize article VI(b) of the Tahoe Regional Planning Compact with certain provisions of the compact construed in *Petty v. Tennessee-Missouri Bridge Comm'n* (1959) 359 U.S. 275. The Ninth Circuit Court of Appeals rejected this contention, observing it to be "somewhat contrived". *Jacobson v. Tahoe Regional Planning Agcy.* (9th Cir. 1977) 566 F.2d 1353, 1362. We agree with the Court of Appeals and will demonstrate the invalidity of petitioners' argument.

California's position rests on a principle that is not in dispute. In *Edelman v. Jordan* (1973) 415 U.S. 651, the Court stated the following principle for determining whether an Eleventh Amendment waiver has occurred:

> ". . . we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction' ". *Id.* p. 673.

Petitioners agree that this is the controlling language. See Petition for Writ of Certiorari at p. 24. We will show that there are several other reasonable constructions of article VI(b), none of which lead to a waiver of the Eleventh Amendment.

In this regard article VI(b), with its almost passing reference to federal courts, provides as follows:

> "All ordinances, rules, regulations and policies adopted by the agency shall be enforced by the agency

> and by the respective states, counties, and cities. The appropriate courts of the respective states, each within its limits of territory and subject matter provided by state law, are vested with jurisdiction over civil actions to which the agency is a party and criminal actions for violations of its ordinances. Each such action shall be brought in a court of the state where the violation is committed or where the property affected by a civil action is situated, unless the action is brought in a federal court. For this purpose, the agency shall be deemed a political subdivision of both the State of California and the State of Nevada."

The Court of Appeals pointed to three possible interpretations of the section: First, when read with article III(a) it appears that article VI(b) operates only as a grant of state court jurisdiction over the Tahoe Regional Planning Agency (hereafter TRPA). *Jacobson, supra*, at p. 1362; the second and third possible meanings as noted by the Court of Appeals are acknowledgment of diversity jurisdiction or jurisdiction over suits by the TRPA against the United States under the Tucker Act. *Jacobson, supra*, at p. 1362, fn. 17. A fourth possibility is that the article confers jurisdiction on the federal courts in an action brought by a compacting state against the TRPA where the violation occurred in the other state. *People of St. of Cal. ex rel. Younger v. Tahoe Reg. P. Ag.* (9th Cir. 1975) 516 F.2d 215 (suit by California against the agency claiming violation of compact in regard to two proposed casinos in Nevada). A fifth possibility is that the article acknowledges federal jurisdiction where the agency initiates litigation in a federal court thereby waiving any Eleventh Amendment immunity by virtue of a general appearance. *Petty, supra*, at p. 276.

Petitioners offer a sixth possible construction in an attempt to fit within this Court's holding in *Petty*. Even

assuming that the proffered construction is reasonable, which we dispute, application of the *Edelman* principle precludes a conclusion that the Eleventh Amendment has been waived through the Tahoe Regional Planning Compact. That is, the fact that there are several reasonable constructions of article VI(b), none of which lead to a waiver, eliminates the possibility that petitioners' construction, which does lead to a waiver, is either dictated by the express language of the article or by overwhelming implication from the lack of other reasonable meanings.

Notwithstanding the inescapability of the foregoing conclusion, we will further point out why *Petty* is not controlling.

B. Petty v. Tennessee-Missouri Bridge Comm'n (1959) 359 U.S. 275 Is Not Controlling.

In *Petty* this Court concluded that a "sue and be sued" clause in a compact allowing two states to create an agency which would build and operate transportation facilities over and across a navigable river must be construed as a matter of federal law. That compact also contained a provision, added by Congress, which in relevant portion precluded any diminishment of federal court jurisdiction over navigable waters or commerce.[2] *Petty, supra,* at p. 277.

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2. While section 5 of the Tahoe Regional Planning Compact, added by Congress, is somewhat akin to the language added by Congress in the *Petty* compact, this Court in *Petty* did not rest its holding on that proviso alone. Rather, that proviso "in light" of the sue and be sued clause was held to preserve federal jurisdiction. *Petty, supra*, at p. 281. Moreover, unlike the *Petty* compact, section 5 of the Tahoe Regional Planning Compact makes no reference whatsoever to the federal courts. Finally, the Eleventh Amendment is part of the laws of the United States. To conclude that there has been a waiver of the Eleventh Amendment by a reservation of the applicability of the laws of the United States is to have adopted a circular argument. See Dissent of Justice Frankfurter in *Petty, supra,* at p. 288.

Construing these two provisions together, this Court concluded that the Eleventh Amendment immunity had been waived in a suit by the widow of an employee who had been killed while operating a ferryboat for the interstate agency.

There is no similarity between the compact involved in *Petty* and the Tahoe Regional Planning Compact. The latter compact contains only the indirect reference to the federal courts discussed previously. In no way can that be considered the equivalent of the express consent to sue and be sued as dealt with in the *Petty* compact. Further distinguishing *Petty*, article VII(f) states: "No obligation contracted by the agency shall bind either of the party states or any political subdivision thereof." This is a clear statement by the compacting states of their intention not to waive Eleventh Amendment immunities.

Finally, the instant case is distinguishable from *Petty* for the same reasons that *Petty* was distinguished in *Edelman*. In that case this Court construed the Eleventh Amendment to prevent actions in federal court for money claims payable from a state treasury. *Edelman* also involved the question of waiver of Eleventh Amendment immunity and held that Illinois had not waived its immunity by participating in the federally initiated Social Security program. *Supra* at page 3 we pointed out that *Edelman* requires a strong showing that states intend to waive their immunity under the Eleventh Amendment.[3] More specifically, this Court, distinguishing *Petty*, spoke directly to the requirements for a waiver in the context of an interstate compact:

3. This Court also observed in *Edelman*:
"'[W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found.'" *Id.* p. 673.

"Similarly, *Petty v. Tennessee-Missouri Bridge Comm'n, supra*, involved congressional approval, pursuant to the Compact Clause, of a compact between Tennessee and Missouri, which provided that each compacting State would have the power 'to contract, to sue, and be sued in its own name.' *The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity.*

"*But in this case the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent.* Thus respondent is not only precluded from relying on this Court's holding in *Employees*, but on this Court's holdings in *Parden* and *Petty* as well." *Id.* p. 672. (Emphasis added).

Thus, this Court concluded that Eleventh Amendment waivers can be found where there is consent by the participating states or where Congress intended to abrogate the immunity and the states, by their participation, had in effect consented to that abrogation. *Edelman* was distinguished from *Petty* on this ground since the Court concluded that Congressional authorization to sue the participating states was wholly absent.

Likewise in the Tahoe Regional Planning Compact, as we have pointed out, there is no indication of a waiver of the Eleventh Amendment either in the organic legislation enacted by the states or in the Congressional ratification thereof. Therefore, the case at bar presents the opposite circumstance of that presented in *Petty*. Instead it is like the situation presented in *Edelman*.

CONCLUSION

In summary, the principles of law governing the presence or absence of an Eleventh Amendment waiver have been established by this Court. The decision of the Court of Appeals correctly applied these principles and was also correct in asserting petitioners' argument to be "contrived". The specter of great uncertainty raised by petitioners simply does not exist as there is no conflict in the decisions regarding Eleventh Amendment waivers. Thus under the decided principles enunciated by this Court, the adoption and acceptance of the Tahoe Regional Planning Compact by the contracting states of California and Nevada did not result in a waiver of the Eleventh Amendment. There is no important question of federal law raised and California respectfully requests that the Petition for Writ of Certiorari be denied.

Dated: April 18, 1978

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Supreme Court, U. S.
FILED
MAY 15 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

No. 77-1327

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Respondents.

On Petition for Writ of Certiorari to the United States Supreme Court

BRIEF FOR RESPONDENTS JAMES HENRY AND WILLIAM BRINER IN OPPOSITION TO PETITION FOR CERTIORARI

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On Petition for Writ of Certiorari to the United States Supreme Court

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BRIEF FOR RESPONDENTS JAMES HENRY AND WILLIAM BRINER IN OPPOSITION TO PETITION FOR CERTIORARI

Since petitioners do not object to the order dismissing the respective counties in this proceeding, this brief will discuss only those issues pertinent to respondents, James Henry and William F. Briner, who are sued as members of the Tahoe Regional Planning Agency (hereinafter called TRPA) legislative body.

OPINION BELOW

The opinions of the courts below are appended to the petition for certiorari.

JURISDICTION

Respondents do not contest that this Court, technically, has jurisdiction pursuant to 28 U.S.C. §1254(1); it is submitted, however, that the case is not yet ripe for review.

QUESTIONS PRESENTED

1. Respondents, Briner and Henry, are elected members of the Placer County Board of Supervisors. The Tahoe Regional Planning Compact (Act of December 18, 1969, Pub. L. No. 91-148, 83 Stat. 360, Art. III(a)), requires that they serve on the governing board of the Tahoe Regional Planning Agency. Articles V and VI of said Compact require that they enact ordinances and regulations for the protection of the environment of the Lake Tahoe Region.

> Are members of the legislative body of the Tahoe Regional Planning Agency entitled to absolute immunity for the enactment of land use ordinances and regulations designed to protect the Lake Tahoe environment as required by the Tahoe Regional Planning Compact?

2. The Court of Appeals held that a cause of action may be stated for violation of the Fifth Amendment rights by one acting under color of federal law pursuant to 28 U.S.C. §1331. This statute has never been construed as authorizing an action for damages based upon land use regulation. Unless this Court sees fit to broaden the jurisdiction under this section to authorize damages for any claimed violation of constitutional rights, then the decision of the Court of Appeals granting absolute immunity should be upheld on the independent ground that Section 1331 does not authorize an award for damages for land use regulation.

> Does 28 U.S.C. §1331 authorize an award of damages against individuals acting under color of federal law in the area of land use regulation?

3. The cases below were decided on the pleadings alone. The record before the Court of Appeals was extremely sparse. The complaints were based upon enactment, implementation and enforcement of the Lake Tahoe Regional General Plan. It is not possible, from the reading of the record, to determine precisely what petitioners are complaining about. In effect, this Court is being asked to render an advisory opinion regarding the liability for administering and enforc-

ing the TRPA Plan, without knowing whether the actions complained of were legislative or executive, and without knowing any of the facts forming the foundation for the litigation.

> Is a case against the individual legislators of the Tahoe Regional Planning Agency ripe for review by the Supreme Court without the benefit of a record showing the precise actions taken by the individuals, or the effect of such actions on the petitioners?

STATUTES INVOLVED

The statutes involved are these:

1. Tahoe Regional Planning Compact, Public Law No. 91-148, 83 Stat. 360. The text thereof is appended to the petition for certiorari as Appendix E.
2. The Eleventh Amendment to the Constitution of the United States.
3. 28 U.S.C. §1331.

STATEMENT OF THE CASE

In 1968, California and Nevada entered into a Compact to create a regional agency for the purpose of protecting the environment of the Lake Tahoe Basin (Cal. Gov't Code §§66800, et seq.; Nev. Rev. Stat. §§277.190 et seq.). The Compact was consented to by Congress in 1969 (Pub. L. No. 91-148, 83 Stat. 369).

Respondents Briner and Henry were elected members of the Placer County Board of Supervisors, and the only supervisors who were residents of the county supervisorial district line within the Tahoe Basin. Accordingly, they were required by the Compact to serve as members of the governing body of the TRPA (see Compact, Art. III(a)).

> "There is created the Tahoe Regional Planning Agency as a separate legal entity.
>
> "The governing body of the Agency shall be constituted as follows:
>
> "One member appointed by each of the county boards of supervisors of the Counties of El Dorado and Placer, and the one member appointed by the City Council of the City of South Lake Tahoe. Each member shall be a member of the City Council or County Board of Supervisors which he represents and, in the case of a supervisor, shall be a resident of a county supervisorial district lying wholly or partly within the region. . . ."

Article V of said Compact requires that the Agency establish a regional plan designed to regulate land use, water and air quality, transportation, public services, etc., for the purpose of conserving the environment of the Basin.

Article VI of said Compact requires that the governing body adopt all necessary ordinances, rules, regulations and policies to effectuate said plan, and requires that the Agency enforce all such ordinances and regulations.

Various individuals complained that the enactment, implementation, and enforcement of the ordinances and regulations violated their rights under the Fifth and Fourteenth Amendments to the United States Constitution.

The District Court dismissed each of the actions. The Ninth Circuit held that, although the individual governing board members were immune from suit for enactment of ordinances pursuant to the Compact, the Court was unable to determine from the record whether the acts complained of arose by reason of the officer's exercise of legislative or executive powers. Accordingly, the cases were remanded to the District Court for further factual development as to the nature of the challenged actions.

REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

A. MEMBERS OF THE TRPA GOVERNING BODY ARE REGIONAL LEGISLATORS, ENTITLED TO ABSOLUTE LEGISLATIVE IMMUNITY.

Petitioners attempt to characterize the TRPA governing board as something akin to the directors of a school district or a subordinate state agency, performing purely local functions. Nothing could be further from the truth.

The protection of the Lake Tahoe environment is a matter of national importance, transcending the interests of any state or local governmental entity.

The national interest in Lake Tahoe and its environment is pointed out in the article, "Lake Tahoe: The Future of a National Asset—Land Use, Water, and Pollution" (52 Calif. L. Rev. 563 (1964):

> "In *Roughing It,* Mark Twain wrote of lake Tahoe: 'As it lay there with the shadows of the mountains brilliantly photographed upon its surface I thought it must surely be the rarest picture the whole earth affords.' Since its discovery in 1844 by John C. Fremont, Lake Tahoe's natural beauty and the surrounding area's scenic attraction has been praised by both permanent residents and an increasing flood of tourists. Situated geographically in a climate which makes possible year-round use as a recreation center, it lies within a four-hour drive of some 3 million people and scarcely more than a one-day's drive of nearly 10 percent of the total population of the United States."

See also S.Rep. 91-510, 91st Cong., 1st Sess. (1969), 115 Cong. Rec. 33068-33069 (1969).

> "Only two other sizeable lakes in the world are of comparable quality—Crater Lake in Oregon, which is protected as part of the Crater Lake National Park, and Lake Baikal in the Soviet Union. Only Lake Tahoe, however, is so readily accessible from large metropolitan centers and is so adaptable to urban development."

In 1971, the Counties of Placer and El Dorado challenged the authority of TRPA over land use control. The Counties' contention was that land use control is essentially a local affair, committed to the exclusive jurisdiction of the counties under the pro-

visions of the California Constitution. This challenge was rejected by the California Supreme Court in the *Case of People, ex rel. Younger v. County of El Dorado,* 5 Cal.3d 480, 486 P.2d 1193 (1971).

The Court stated, at page 486:

> "Today, and for the foreseeable future, the ecology of Lake Tahoe stands in grave danger before a mounting wave of population and development."

The Court concluded, at page 494:

> "Only an agency transcending local boundaries can devise, adopt and put into operation solutions for the problems besetting the region as a whole. Indeed, the fact that the Compact is a product of the cooperative effort and mutual agreement of two States is impressive proof that its subject matter and objectives are of regional rather than local concern."

Article VI(b) requires that all ordinances, rules, regulations and policies adopted by the Agency shall be enforced not only by the counties and cities, but also by the respective states. At least to this extent, the power of the Agency and its legislative body transcends even the powers of the states.

Clearly, the duties exercised by the legislative body of the TRPA are of regional and even national importance. Accordingly, they should be granted the same legislative immunity granted to state and federal legislators.

B. POINTS AND AUTHORITIES DISTINGUISHED

The authorities cited by petitioners wherein only qualified immunity was granted did not involve legislative acts.

Procunier v. Navarette, ... U.S. ....., 55 L.Ed.2d 24 (February 1978), held that State Prison officials are entitled to qualified immunity in civil rights actions under 42 U.S.C. §1983, for violation of prisoners' First Amendment rights.

O'Connor v. Donaldson, 422 U.S. 563 (1975), was a case brought by a former mental patient pursuant to Section 1983, alleging that the director of the mental hospital had violated his constitutional right to liberty by confining him in a State Mental Hospital for nearly 15 years for purely custodial purposes, although the patient was not a danger to himself or others, and responsible persons had indicated a willingness to help care for the patient upon his release.

Wood v. Strickland, 420 U.S. 308 (1975), was a civil rights suit against members of a school board for wrongful expulsion of a student. The case did not involve either the validity of the regulations or the potential liability for enactment thereof. The decision was based on alleged expulsion of students without any basis whatsoever.

In reversing the Court of Appeals, this Court held, at page 326:

> "Given the facts that there *was* evidence supporting the charge against respondents, the contrary judgment of the Court of Appeals is improvident. It is not the role of the Federal Courts to set

aside decisions of school administrators which the Court may view as lacking a basis in wisdom or compassion."

Williams v. Anderson, 562 F.2d 1081 (8th Cir. 1977), involved purposeful racial discrimination on the part of members of a school district with respect to salaries, assignments, promotion, and hiring of black faculty members.

Hostrop v. Board of Junior College Districts, 523 F.2d 569 (7th Cir. 1975), was a civil rights action involving the termination of a junior college president without affording him the due process right to a hearing.

Jones v. Diamond, 519 F.2d 590 (5th Cir. 1975), held that the members of the Board of Supervisors are entitled to qualified immunity for alleged violation of a Mississippi ordinance which required them to examine into the state of the jail at least once in every three months, and further alleging that the supervisors, sheriff, and other defendants discriminated against black prisoners by excessive confinement in cells, unsanitary and unsafe conditions, mail censorship, physical abuse, inadequate medical attention, contaminated food, and other similar complaints.

Roberts v. Williams, 456 F.2d 819 (5th Cir. 1971), was an action against individual supervisors for violation of a Mississippi statute which required that they provide for the safekeeping, clothing, housing, etc., of prisoners at a county youth farm. The decision of the trial court dismissing the individual members of the Board of Supervisors was sustained. The Court held, at page 985:

"In the final analysis, plaintiff cannot point to any individual act of a supervisor as having a causal relation to the subject matter of this litigation and the personal injuries sustained by plaintiff. . . ."

Nelson v. Knox, 256 F.2d 312 (6th Cir. 1958), held that the Mayor and City Councilmen were immune from good faith enforcement of ordinances which had the effect of destroying plaintiff's business, whether or not such ordinances were constitutional.

Cobb v. City of Maulden, 202 F.2d 701 (1st Cir. 1953), held that a civil rights action could be brought against city officials for conspiracy to violate the contract rights of school teachers by refusing to grant salary increases required by pre-existing contracts.

Thomas v. Younglove, 545 F.2d 1171 (9th Cir. 1976), was a case in which supervisors were charged with discriminating against members of a labor union by paying them lower wages than non-union members, and by falsely bringing charges against them in an attempt to have them removed from their jobs. In remanding the case for further proceedings, the Ninth Circuit held, at page 1173:

"The questioned activity may or may not share in the 'speech and debate' immunity conferred upon legislators (cf. *Gillibeau v. City of Richmond,* 417 F.2d 426 (9th Cir. 1969))."

Nelson v. Knox, 256 F.2d 312 (6th Cir. 1958), upheld a District Court decision in favor of the mayor, city manager and city commissioners in an action by

a garage owner for allegedly passing and enforcing discriminatory ordinances. The discusssion of qualified versus absolute immunity cited by petitioner was pure dicta.

Scheuer v. Rhodes, 416 U.S. 232 (1974), was a case involving the killing of students at Kent State University. There was no factual record before this Court, and this Court declined to define the scope of executive immunity.

A review of the cases cited by petitioner shows that the doctrine of absolute legislative immunity has been followed, not only by this Court, but by each other Court which has squarely decided the issue. A doctrine of qualified, rather than absolute immunity, has been invoked only in those cases where individuals were acting in a ministerial or executive capacity, as opposed to a legislative capacity.

Contrary to petitioner's argument, the Ninth Circuit's opinion granting absolute immunity to members of the TRPA governing body for legislative acts is founded on sound and virtually unchallenged authority. Those cases invoking the doctrine of qualified immunity are simply not in point.

C. PETITIONERS' REMEDY AGAINST MEMBERS OF THE TRPA LEGISLATIVE BODY SHOULD BE RESTRICTED TO DECLARATORY OR INJUNCTIVE RELIEF.

The members of the TRPA governing body are charged with a heavy responsibility in preserving a valuable national asset.

The dividing line between necessary regulation for the protection of the Lake Tahoe environment and impermissive restriction on private property rights is practically imperceptible. No clear guidelines have been drawn by the courts in this area. Each parcel of property is unique, and the weighting of environmental concerns vis-a-vis property rights varies with each case.

If, by the enactment and implementation of the TRPA regulations, the development plans of some land speculators are restricted unduly, such rights can be restored by way of injunctive or declaratory relief.

The alternative of subjecting governing board members to the spectre of personal liability to such speculators could well inhibit the bold and innovative efforts necessary to preserve Lake Tahoe, and instead, result in faint-hearted and timorous regulation, permissive over-development, and irreparable harm to the environment of the Lake Tahoe Basin.

As this Court held, in *Tenney v. Brandhove,* 341 U.S. 367 (1951) at page 377:

> "One must not expect uncommon courage, even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives."

It is submitted that this same policy principle should be applied in this case and that the Court's jurisdic-

tion under 28 U.S.C. Section 1331 should be limited to declaratory or injunctive relief.

The Court of Appeals held that *Bivens v. 6 Unknown-named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), might be applicable to a damage action for discriminatory enforcement of the TRPA regulations. Without a factual record, however, the Court was unable to determine whether this is an appropriate case for the application of *Bivens.*

Bivens, however, has never been extended to provide a damages remedy for the enforcement of land use regulations. It is submitted that there is nothing in the record which would justify extending the *Bivens* theory to this case.

Bivens was the innocent victim of an unreasonable search and seizure by narcotics agents. As pointed out by Justice Harlan in his concurring opinion (430 U.S., at page 409):

> "Putting aside the desirability of leaving the problem of federal official liability to the vagaries of common law actions, it is apparent that some form of damages is the only possible remedy for someone in *Bivens'* alleged position."

In all of the cases wherein damages were awarded under the *Bivens* theory, there was no other practicable remedy available to the injured person. In cases such as this, however, the enactment or enforcement of land use regulations can be remedied by injunctive or declaratory relief, and there is no need to extend the common law remedies to an action for damages against the governing board members.

As was pointed out in *Kosta v. Hogg,* 560 F.2d 37 (1st Cir. 1977) at page 42:

> "When there is a request for the judicial creation of a supplemental damages remedy arising directly under a constitutional provision, *Bivens,* we think, teaches that a federal court should proceed with caution."

Accordingly, upon the present state of the record, the decision of the Ninth Circuit granting absolute immunity to members of the governing board should be sustained on the independent ground that 28 U.S.C., Section 1331, does not authorize an award of damages against individual governing board members (see *Walling v. General Industries Company,* 330 U.S. 545 (1947): Respondent is entitled to urge, in opposition to a writ of certiorari, matters decided contrary to respondent's position, without the necessity of filing a cross-petition for certiorari).

D. THE CASE BEFORE THE COURT IS NOT RIPE FOR REVIEW

In the case of *Brotherhood of Locomotive Firemen and Enginemen v. Bangor and Aroostook Railroad Company, et al.,* 380 F.2d 570 (1967), the Union appealed from a contempt order of the District Court. The Court of Appeals ruled on various legal issues, including the following: The Court upheld the Trial Court's denial of a Motion for Disqualification of the Trial Court Judge; upheld the denial for a Request for a Jury Trial; upheld the Trial Court's decision

that the appellees had standing to sue; and held that the underlying Restraining Order cannot be attacked in the contempt proceedings. The Appellate Court, however, remanded to the District Court to consider whether there was in fact a contempt, and if so, whether it was of such magnitude as to warrant the substantial fines imposed.

The Union filed a Petition for Certiorari asking this Court to review the various adverse decisions by the Court of Appeals. This Court, in *Brotherhood of Locomotive Firemen and Enginemen v. Bangor and Aroostook Railroad Company, et al.*, 389 U.S. 327, 19 L.Ed.2d 560 (1967) denied the Petition for Certiorari, holding that the case was not yet ripe for review because it had been remanded by the Court of Appeals for further factual development.

In the instant case, also, the Court of Appeals remanded for the purpose of developing a factual record.

This Court should not be required to rule on the liability of individual defendants for enactment, enforcement, and implementation of TRPA Land Use Ordinances in the abstract.

It is submitted that the record before this Court is simply not sufficient to enable the Court to arrive at an informed decision of the various legal issues.

Until it is determined specifically what actions Plaintiffs are complaining about, the effect of such actions on Plaintiffs, and whether such actions were legislative or executive in nature, the case is not ripe for review.

CONCLUSION

Petitioners have raised no substantial federal question. The doctrine of absolute legislative immunity has been consistently followed by this Court, and is particularly applicable to this case. Whether Petitioners might be able to state a cause of action on some theory outside the present state of the record is an abstract and speculative question which this Court should not be required to decide.

The Petition for Certiorari should be denied.

Dated, May 3, 1978.

Respectfully submitted,

REGINALD LITTRELL,

Attorney for Respondents James Henry and William F. Briner.

Supreme Court, U. S.
FILED
MAY 18 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1327

LAKE COUNTRY ESTATES, INC., a corporation, COUNTRY CLUB ESTATES, a partnership, and BOULDIN DEVELOPMENT CORPORATION, a corporation,
Petitioners,

vs.

TAHOE REGIONAL PLANNING AGENCY, COUNTY OF EL DORADO, and STATE OF CALIFORNIA, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CERTAIN RESPONDENTS IN OPPOSITION TO PETITION

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PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105
A BOWNE COMPANY

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METHOD OF CITATION

For ease of reference herein, the above-named respondents adopt the reference system utilized by petitioners in their Petition and the following additional references:

TRPA	—	Defendant-Respondent Tahoe Regional Planning Agency
Petitioners	—	Lake Country Estates, Country Club Estates, and Bouldin Development Corporation, and each of them
States	—	The State of California and the State of Nevada
R.	—	Record on Appeal (e.g., R. 7:19-21 means Record, page 7, lines 19 to 21)
Ordinance	—	TRPA *Land Use Ordinance*
Compact	—	Tahoe Regional Planning Compact [Act of December 18, 1969, Public Law 91-148, 83 Stat. 360]
Individual Defendants	—	All of the respondents above-named, excluding TRPA, and James Henry, William Briner and Norman B. Livermore
Petition	—	Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit herein

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1327

LAKE COUNTRY ESTATES, INC., a corporation, COUNTRY CLUB ESTATES, a partnership, and BOULDIN DEVELOPMENT CORPORATION, a corporation,
Petitioners,

vs.

TAHOE REGIONAL PLANNING AGENCY, COUNTY OF EL DORADO, and STATE OF CALIFORNIA, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CERTAIN RESPONDENTS IN OPPOSITION TO PETITION

OPINIONS BELOW

The opinions of the lower courts are adequately referenced in the Petition.

JURISDICTION

The jurisdictional statement set forth in the Petition is accurate.

QUESTIONS PRESENTED

1. Does the Eleventh Amendment provide immunity from suit in federal district court to TRPA, a compact created governmental entity performing environmental and land use planning functions in portions of two states with membership composed of an equal number of representatives from each state and one federal representative?

2. Does TRPA, a bi-state agency created by interstate compact, lose Eleventh Amendment immunity when the compact creating it terms it a political subdivision of *both* states for venue purposes?

3. Do members of the governing body of TRPA, composed of five (5) members from each state and one federal representative, with jurisdiction over portions of two states, have absolute immunity from damage claims allegedly arising from their legislative acts?

STATUTES INVOLVED

The Petition adequately references the pertinent statutes.

STATEMENT OF THE CASE

TRPA was created in 1969 by Congressional ratification of the proposed compact between the States of California and Nevada [Act of December 18, 1969, Public Law 91-148, 83 Stat. 360]. The Compact invests TRPA with jurisdiction over the watershed area of the Lake Tahoe Basin, a basin encompassing portions of both states [Article II(a), Compact].

Because of deficiencies in environmental control and governmental effectiveness in the Lake Tahoe Basin, TRPA was created with Compact goals of "resource conservation and orderly development" [Article I(b) and (c), Compact; 115 Cong. Rec. 33068-33069; and Footnotes 1, 2, 3, and 16 of *Younger v. County of El Dorado*, 5 Cal. 3d 480, 487 P. 2d 1193 (1971)]. TRPA was designed to provide the "coordinated planning, conservation and resource development essential to accommodate a growing population within the Region's relatively small area without destroying the environment". *Younger v. County of El Dorado, supra*, 5 Cal. 3d at 488.

The Compact requires TRPA to adopt a regional plan within fifteen months after its formation, which plan must include at least the following correlated elements:

(i) An integrated land use plan for the entire Region;

(ii) An integrated transportation plan dealing with all modes of transportation and pertinent facilities;

(iii) A conservation plan for the preservation and management of the scenic and other natural resources of the Region;

(iv) A recreation plan for the development, utilization and management of recreational resources within the Region; and

(v) A public services and facilities plan.
[Article V(b), Compact].

TRPA is empowered to consider, adopt, and enforce said Plan and "all necessary ordinances, rules, regulations and policies to effectuate the adopted Regional Plan" on a broad spectrum of subjects including: water quality, air pollution, watershed protection, flood plain protection, soil and sedimentation control, sewage disposal, zoning, subdivision, grading, water related developments, and review of public works projects [Article VI(a), (c) and (d), Compact].

Although created as a "separate legal entity" [Article III(a), Compact], the governing body formed to carry out the mandates of the Compact is divided equally between the two states (five from each) plus one appointee of the President of the United States [Article III(a) and § 3, Compact]. The five governing body members from each state are each composed of three elected officials of each of the local governments of each state and two representatives of each state government [Article III(a), Compact].

The Compact requires local governments within the Region to pay no more than $150,000.00 of TRPA's funding [Compact, Article VII]. In accordance with the Compact authorization for TRPA to obtain financing from other sources [Article VII, Compact], most of TRPA's funding comes from state and federal sources and application fees.

Article VI(b) of the Compact requires TRPA and all other state and local governments within the Region to enforce TRPA regulations. Jurisdiction over such suits is vested in state courts. The third sentence

of Article VI(b) provides venue provisions for such actions "unless the action is brought in a federal court". "For this purpose, the Agency shall be deemed a political subdivision of *both* the State of California and the State of Nevada" [last sentence of Compact, Article VI(b); emphasis supplied].

Petitioners are the owners of, or have an interest in, real property within the Region which is subject to TRPA's jurisdiction [R. 112:1-13; R. 116:26-30].

Pursuant to Compact requirements [Articles V(c)(5) and VI, Compact], TRPA adopted its Regional Plan on December 22, 1971 [R. 112:26 and R. 117:16] and *Land Use Ordinance* on February 10, 1972 [R. 112:26-29]. The Regional Plan classified a portion of petitioners' property "General Forest" and the remainder "Conservation Reserve" [R. 112:29-30; R. 113:1-2; and R. 117:16-18].

Desiring to develop their property inconsistent with TRPA's classifications, petitioners submitted a (self-proclaimed) vague [R. 380] master plan to TRPA which application was denied [R. 372-381].

TRPA *sua sponte* rezoned petitioners' land to Conservation Reserve permitting development in accordance with a comprehensive development proposal ("specific plan") and requested petitioners apply for specific plan approval [R. 380; R. 87; R. 113:11-15; and R. 117:27-118:1].

Rather than submit the specific plan solicited by TRPA, petitioners filed this suit, quickly concluding that TRPA's single refusal to approve *their* master

plan forever prohibited any use of land [R. 113:16-19; 118:2-5]. No development application other than the vague master proposal has ever been tendered by petitioners to TRPA [R. 113:24-28; 118: 10-13; 108-132].

TRPA has no authority to own or condemn property [Compact] and has never announced any intention to acquire all or any portion of petitioners' or anyone else's property.

On April 16, 1973, petitioners filed separate complaints in the United States District Court for the Eastern District of California and in the Superior Court of the State of California for the County of El Dorado against TRPA, El Dorado County, the States of California and Nevada, the then members of TRPA's governing body, and TRPA's then Executive Officer. On May 13, 1976, the state court action was dismissed and no appeal has been taken therefrom. The federal court action is the subject of this petition and, like the state court action, alleges that petitioners' property has been taken without just compensation and without due process of law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution [R. 108, *et seq.*]. Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §§ 1331, 1343 and 2201 [*id.*].[1]

[1]Three (3) other cases were the subject of the opinion hereinbelow. Consistent with the Petition, we omit reference to the facts and issues therein because the parties in those separate actions have not timely petitioned this Court and all cases were the subject of separate judgments in both the District Courts and the Court of Appeals; Supreme Court Rules 21(4) and 23(5).

DISPOSITION BELOW

Pursuant to motions to dismiss, judgment of dismissal was entered by the District Court on December 16, 1975 [R. 634]. It found that although the complaint, under customary pleading rules, would be sufficient to state a cause of action in inverse condemnation, such a cause of action was not available against TRPA by virtue of its lack of condemnation powers. Accordingly, TRPA was dismissed. The District Court also dismissed the individual defendants on the grounds that they are immune from liability for damages.

Petitioners timely appealed. For purposes of oral argument only this case was consolidated with three other cases involving TRPA. On August 5, 1977, the Ninth Circuit Court of Appeals rendered its initial opinion herein.[2] By that opinion, the Ninth Circuit affirmed the District Court's determination that inverse condemnation and monetary relief are inappropriate against TRPA, that the individual defendants are absolutely immune from actions for damages arising from legislative acts and that all other defendants were appropriately dismissed. It reversed the District Court, however, on the propriety of declaratory and injunctive relief against TRPA, and remanded for factual development of whether the acts of the individual defendants were legislative or executive in nature.

[2]Since petitioners do not assert error in the dismissal of other parties defendant (i.e., the states and county), we do not discuss the lower court's grounds therefor nor do we hereinafter brief the propriety of those dismissals.

TRPA petitioned for rehearing. On December 21, 1977, the Court of Appeals withdrew its August 5, 1977 opinion and issued a second opinion in its place. The second opinion's only pertinent departure from the first opinion is it holds TRPA immune from suit.[3] TRPA's immunity from suit was premised on the Eleventh Amendment, an issue which had been briefed and argued in connection with the propriety of suit against the states. Consistent with its initial opinion regarding the Eleventh Amendment immunity of California and Nevada, the Ninth Circuit Court of Appeals held that TRPA was also immune from suit pursuant to the Eleventh Amendment. In doing so, it separately relied upon the opinion of this court in *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959) and upon the analysis of the Eighth Circuit opinion in *Petty* [254 F. 2d 857].

Petitioners' petition for rehearing was denied.

[3]Other changes were made in the second opinion. Although many of such changes were cosmetic and none are pertinent to the issues herein, in the interests of being comprehensive, such changes include: (i) *Jacobson* was dismissed for lack of standing; (ii) the discussion of pleading and procedural issues was condensed; (iii) the Court elaborated upon the grounds for dismissing the counties; (iv) the Court condensed its disposition of questions of state law; (v) all discussion of avoiding characterizing TRPA as "an arm of the state" was deleted; (vi) issues pertaining to the dismissal of the United States were rewritten; (vii) the Court expanded upon the guidelines given the District Court regarding the qualified immunity of the individual defendants; and (viii) substantial dictum in *Layton-Tahoe* was deleted.

SUMMARY OF ARGUMENT

THE REASONS PROFFERED FOR THIS COURT GRANTING CERTIORARI ARE SPURIOUS. AFFORDING TRPA IMMUNITY PURSUANT TO THE ELEVENTH AMENDMENT IS CONSISTENT WITH ALL APPLICABLE AUTHORITY. ABSOLUTE IMMUNITY FOR LEGISLATORS WITH JURISDICTION OVER AN AREA NOT SUBJECT TO THE CONTROL OF EITHER STATE COMPORTS WITH PRIOR DECISIONS OF THIS COURT AND CONFLICTS WITH NO OTHER AUTHORITY

Petitioners proffer two "significant" issues for this Court's consideration on certiorari. First, petitioners question the propriety of TRPA's Eleventh Amendment immunity from suit in federal court. Second, petitioners argue that absolute immunity for legislators acting over a region not subject to the control of the constituent states is improper.

To concede that these issues are significant to these litigants (and perhaps to the other three compact entities exercising environmental and land use powers') does not concede the significance of these issues as a general matter. Few issues are unimportant as between litigants.

The "great controversy" that petitioners find surrounding the incursion of 175 compacts during the nearly 200 years of the Compact Clause is belied by the 25 cases annotated in United States Code Service under the Compact Clause. To be sure, compacts are a valuable tool to solve important disputes between states such as boundaries, water apportionment, port authorities and subjects of intergovernmental coopera-

[4]64 Stat. 568 (1950); 75 Stat. 170 (1961); and 75 Stat. 170 (1954); and see, generally, Council of State Governments, *Interstate Compacts, 1783-1977*, pp. 19-21.

tion (e.g., child welfare and crime control). Zimmerman, *The Interstate Compact Since 1925*, pp. 3-4 and 9-29, and Council of State Governments, *Interstate Compacts, 1783-1977* (1977). However, the relatively small number and limited scope of compacts is evident from the cited texts. Petitioners' suggestion that compacts and the entities occasionally created thereby have become a pervasive and powerful force in the United States is sheer nonsense [*id.*].

Nearly every reported decision has either expressly held or assumed that compact entities are afforded Eleventh Amendment immunity from suit in federal court. *Trotman v. Palisades Interstate Park Commission*, 557 F. 2d 35, 38 (2d Cir. 1977); *Petty v. Tennessee-Missouri Bridge Commission*, 254 F. 2d 857, 859-860 (8th Cir. 1958), reversed on other grounds, 359 U.S. 275 (1959); *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959); *Powell v. Port Authority*, 34 F. Supp. 797 (D.N.J. 1940); and *Rao v. Port Authority*, 122 F. Supp. 595 (E.D.N.Y.) affirmed 222 F. 2d 362. The lone exception unearthed by petitioners is a District Court opinion by the same judge who was reversed on precisely the same issue by the Second Circuit in *Trotman*. Accordingly, and contrary to the assertions of petitioners, the opinion hereinbelow is in complete uniformity with all other decisions in holding the bistate TRPA immune pursuant to the Eleventh Amendment. Further, the very authority cited by petitioners and other applicable authority rejects petitioners' argument that such immunity has been waived by the Tahoe Regional Planning Compact.

Nor does the holding below that individual legislators acting on issues not subject to the control of any single state are absolutely immune for their acts contravene any authority of this Court or conflict with decisions from other circuits. Petitioners can conjure up such a conflict only by characterizing some of the acts of TRPA as affecting matters which can be construed as being of local rather than statewide or nationwide significance. Such argument conveniently overlooks the spectrum of TRPA's required activities and the interstate nature of its origins and acts. Further, a legislative body does not lose its immunity merely because the area of legislative concern may have "local" overtones.

The decision below comports with applicable authority and presents no issues sufficient to warrant this Court's exercise of its certiorari powers.

— —

ARGUMENT

1. ELEVENTH AMENDMENT IMMUNITY WAS APPROPRIATELY AFFORDED TRPA

A. The Opinion Below Precisely Corresponds With Prior Decisions Of This Court And All Other Circuits.

Relying upon this Court's decision in *Petty* and the rationale of the Eighth Circuit Court of Appeals in its opinion in *Petty*, the Court of Appeals held TRPA immune from suit pursuant to the Eleventh Amendment.

Although petitioners devote the majority of their brief to attacking such holding, they are unable to

cite any persuasive authority in which the identical result was not reached. So, with the exception of one District Court opinion, every case cited by petitioners found Eleventh Amendment immunity to exist for the compact agency. *Trotman v. Palisades Interstate Park Comm., supra; Petty v. Tennessee-Missouri Bridge Commission, supra* (8th Circuit opinion); *Petty v. Tennessee-Missouri Bridge Commission* (Supreme Court opinion); *Powell v. Port Authority, supra;* and *Rao v. Port Authority, supra.* Petitioners' hypothesized conflict between the opinion below and the opinions from other Circuits simply does not exist.

Petitioners accurately note that *one judge,* of all of the courts examining this issue, in denying a motion to dismiss declined to find Eleventh Amendment immunity for a compact entity. *Byram River v. Village of Port Chester*, 394 F. Supp. 618 (S.D.N.Y. 1975). That very same judge was, however, reversed on the identical issue in *Trotman v. Palisades Park Commission, supra.* Accordingly, the lone "conflict" with the decision herein is dubious authority at best.

Petitioners urge that this Court in *Petty* did not reach the question of the applicability of the Eleventh Amendment to the compact agency. Such contention would undoubtedly come as a shock to the concurring and dissenting Justices in *Petty.* Justice Frankfurter, joined by two other justices in dissent, concurred in what they understood to be "[t]he Court['s] acknowledg[ment of] the applicability of the provisions of the Eleventh Amendment to the Tennessee-Missouri

Bridge Commission", *id.*, 359 U.S. at 283. Three justices concurred in the result with the solitary reservation that:

> ". . . [W]e do not reach the question as to whether the Eleventh Amendment immunizes from suit agencies created by two or more states under state compacts which the Constitution requires to be approved by the Congress." *Id.*, 359 U.S. at 283.

Clearly, both the three dissenting justices and the three concurring justices read the majority opinion as determining that the Eleventh Amendment immunized the compact agency. Petitioners accurately point out that the majority opinion of Justice Douglas in *Petty* does use the phrase "assume *arguendo*" before its recitation of such immunity. The remainder of the sentence so stating is, however, noteworthy:

> ". . . [T]his suit *must be* considered as one against the States since this bi-state corporation *is* a joint or common agency of Tennessee and Missouri." *Id.* 359 U.S. at 279 [emphasis supplied].

Stronger language can hardly be envisioned for the Court having found Eleventh Amendment immunity. Further, the holding of *Petty* supports the conclusion that the majority opinion found Eleventh Amendment immunity proper. The majority finds that the immunity afforded by the Eleventh Amendment was waived by the actions of the states in accepting and acting upon a Congressional condition of approval construed as consenting to suit in federal court. There is no need for discussion of *waiver* of

Petitioners attack the opinion below for its "simplistic approach" in affording TRPA Eleventh Amendment immunity without indulging in the analysis and construction of the nature of TRPA as was done by the Eighth Circuit opinion in *Petty*.[5] Such criticism is misplaced. The opinion below, after analyzing and adopting the rationale of this Court in *Petty*, observes:

> "Moreover, even did we not consider ourselves bound by *Petty, we would still find immunity for the reasons set forth in the opinion of the Eighth Circuit.*" [Appendix A, p. 8; emphasis supplied.]

Accordingly, the Ninth Circuit relies on the very rationale that petitioners insist is indispensable to determine the applicability of the Eleventh Amendment to TRPA. Petitioners' criticism that such analysis must be contained in the opinion merely urges prolixity. This Court of Appeals has repeatedly been compelled to characterize and recharacterize the nature of the Tahoe Regional Planning Compact and TRPA in a variety of different contexts. *League to Save Lake Tahoe v. TRPA*, 507 F. 2d 517 (9th Cir. 1974) cert. den. 420 U.S. 974; *Younger v. TRPA*, 516 F. 2d 215 (9th Cir. 1975) cert. den. 423 U.S. 868; *League to Save Lake Tahoe v. B.J.K. Corp.*, 547 F. 2d 1072 (9th Cir. 1976); *League to Save Lake Tahoe v. TRPA*, 558 F. 2d 914 (9th Cir. 1977); and *California Tahoe Regional Planning*

[5] Petitioners' argument that the Second Circuit in *Trotman* engaged in such a prolix analysis before finding immunity for that interstate agency is simply wrong.

Eleventh Amendment immunity if no such immunity exists.

All persuasive authority concurs with the immunity found below.

B. Even Disregarding Prevailing Precedent Does Not Aid Petitioners. The Nature Of The Compact Warrants Eleventh Amendment Immunity For TRPA.

It does not require great sophistication to conclude that an agency created by separate sovereign states because of their inability to individually solve compact goals results in an offspring which, within its sphere of influence, is greater than or at least tantamount to its creators. To be sure, states "create" local entities exercising a small slice of governmental authority not subject to Eleventh Amendment immunity. *Moor v. County of Alameda*, 411 U.S. 693, 717 (1973). Each such entity, however, exercises wholly intrastate authority; authority theretofore exclusively within the purview of the state (or a *state created* predecessor). The manifest distinction at bar, however, is that neither state had authority over or control of the area now subject to control of this compact created offspring.

> "Legislation is the answer, and legislation must be coterminous with the region requiring control . . . The regions are less than the nation and greater than any one State. The mechanism of legislation must therefore be greater than that at the disposal of a single state." Frankfurter & Landis, *"The Compact Clause of the Constitution—A Study In Interstate Adjustments"*, 34 Yale L.J. 684, 707 (1925).

Agency v. Jennings, District of Nevada No. 78-1160 (presently before the Ninth Circuit). Nor is there any dearth of state court characterizations of the Compact and its offspring. *List v. County of Douglas*, 90 Nev. 272, 524 P. 2d 1271 (1974) and *Younger v. County of El Dorado*, 5 Cal. 3d 480, 487 P. 2d 1193 (1971).

As noted by the opinion's reference to the Eighth Circuit opinion in *Petty*, the critical elements relied upon in *Petty* as affording Eleventh Amendment immunity exist with respect to TRPA. So, a majority vote of the members from each state is required for TRPA to take action [Compact, Article III(g); *Younger v. TRPA, supra*]. Substantial appointment powers of board members are reserved to each respective state [Compact, Article III]. Most of TRPA's funding comes from state and Federal government, and even the amount required of local government [Compact, Article VII] is imposed upon local government by state action of Compact adoption. *Younger v. County of El Dorado, supra.* Finally, and perhaps most importantly (such was treated as the only basis for affording immunity to the compact agency in *Trotman, supra*) the treasuries of the respective states are ultimately accountable for monetary relief against TRPA. NRS 41.035(9) and *Williams v. Horvath*, 16 Cal. 3d 834 (1976).

The opinion of the Second Circuit in *Trotman* is not alone in its observation that, regardless of the names of the parties, Eleventh Amendment immunity extends to *any* entity or individual when the monetary

recovery, if any, comes from state funds. In *Edelman v. Jordan*, 415 U.S. 651 (1973) this Court states the identical rule.

> "Thus, the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Id.*, 415 U.S. at 663.[6]

All of the elements necessary to afford Eleventh Amendment immunity to TRPA pursuant to the rationale of the Eighth Circuit in *Petty* are present. Appellants purport to find some comfort in arguing one Compact provision makes TRPA more "local" than "state". Petitioners rely on Compact language that, for limited purposes, TRPA is deemed a political subdivision of *both* states [Compact, Article VI(b)].[7] How TRPA's having a foot in both states (not *one* state) aids petitioners' argument is unclear. Certainly, an agency partaking of *two* states has immunities greater than or at least equal to the immunity afforded a single state.

Petitioners attempt to construe some of TRPA's functions and areas of influence as similar to functions and influences traditionally those of local, rather than state, government. Laboring under their analogy, petitioners desire TRPA stripped of Eleventh Amend-

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[6]The exception to this rule does not apply herein. [*Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)] as the silence of the Petition eloquently attests.

[7]Petitioners' argument that this Compact provision makes TRPA a political subdivision of *each* state for *all* purposes is contrived at best. See generally pp. 22-24, *infra*.

ment immunity because *some* of its attributes are *traditionally* more local than state.[8]

Labels such as "local", "state" or "national" do not illuminate. No authority supports utilizing such characterizations as an *ipse dixit* formula for determining immunity. Moreover, such labels fail to recognize that changing circumstances alter the area of concern.

> ". . . [F]rom time to time what was of local concern, and therefore wisely left to local action, becomes a national concern vindicated through national regulation." Frankfurter & Landis, *supra*, 39 Yale L.J. at 724.[9]

And, it was precisely the inability of local government and the impotence of the states acting alone to deal with Tahoe's problems which resulted in a non-local approach through TRPA. *Younger v. County of El Dorado, supra*, 5 Cal. 3d at 495 (footnote 16).

> "The water that the Agency is to purify cannot be confined within one county or state; it circulates freely throughout Lake Tahoe. The air which the Agency must preserve from pollution knows no political boundaries. The wildlife which the Agency should protect ranges freely from one local jurisdiction to another. Nor can the population and explosive development which threaten the region be contained by any of the local authorities which govern parts of the Tahoe Basin. Only an agency transcending local boundaries can devise, adopt and put into operation solutions for the problems besetting the region as a whole." *Id.*, 5 Cal.3d at 494-495.

[8]Petitioners' "tradition" is no more than that. Similar, albeit less comprehensive, functions as those of TRPA are performed by state government rather than local government (e.g., § 30300, California Public Resources Code).

[9]See, also, *Dyer v. Sims*, 341 U.S. 22, 26 (1950), in which this Court, with considerable prescience, observed that the "local" concern of water pollution "might, on occasion, be an appropriate subject for national legislation".

Not only does petitioners' analogy fail, but it is clear that even if the analogy were pursued, TRPA is far more than a local government. *Id.* and *League to Save Lake Tahoe v. TRPA*, 507 F.2d 517, 524 (9th Cir. 1974) cert. den. 420 U.S. 974.

> ". . . [I]nterstate compacts frequently involve not only local concerns of the states involved, but also important national interests. *Dyer v. Sims, supra*, 341 U.S. at 27. See also *Petty, supra*, 359 U.S. at 282, n. 1. The instant Compact deals with much more than mere local concerns such as zoning and land use. It addresses the environmental problems of an area not subject to the control of a single state." *Id.*

Petitioners' attempt to give TRPA a local rather than state character is belied by the Compact, authority construing the Compact and reality. It has taken separate actions by each state before their respective Supreme Courts merely to obtain local government's grudging compliance with the Compact. *Younger v. County of El Dorado, supra,* and *List v. County of Douglas, supra.* Eleventh Amendment immunity for TRPA is appropriate.

2. THE COMPACT DOES NOT WAIVE ELEVENTH AMENDMENT IMMUNITY

Relying upon the opinion of this Court in *Petty v. Tennessee-Missouri Bridge Commission*, petitioners urge that the Compact waives TRPA's Eleventh Amendment immunity.[10]

In *Petty*, this Court found Eleventh Amendment immunity waived because the states accepted and acted upon a condition of Congress attached to its ratification of that compact authorizing federal court suit. Said condition provides:

> "That nothing herein contained shall be construed to affect, impair, or diminish any right, power, or *jurisdiction* of the United States or of any *court*, department, board, bureau, officer, or official of the United States, over or in regard to any navigable waters or any commerce between the states or with foreign countries, or any bridge, railroad, highway, pier, wharf, or other facility or improvement, or any other person, matter, or thing, forming the subject matter of the aforesaid compact or agreement or otherwise affected by the terms thereof." 63 Stat. 930 [emphasis supplied].

Conspicuously absent from the Tahoe Regional Planning Compact is any similar Congressional condition of approval. Indeed, the conditions of approval attached by Congress herein appear to be drafted in

[10]Curiously, petitioners contend that the opinion below erred in finding no waiver of immunity only as to TRPA. No such argument is proffered as to the states. Petitioners have a difference without a distinction.

specific avoidance of the provisions held to waive Eleventh Amendment immunity in *Petty*. [See §§ 2 through 7 of Public Law 91-148, 83 Stat. 360.]

The absence of the very element relied upon by this Court to find a waiver of immunity in *Petty* was noted by the Ninth Circuit as follows:

> "The difference between *Petty* and this case is that in *Petty*, Congress attached a proviso that proved critical to the Supreme Court's determination that the states had waived immunity to suit against the bi-state corporation. The Court observed that
>
> '[I]f there be doubt as to the meaning of the sue-and-be-sued clause in the setting of the compact prior to approval by Congress, the doubt dissipates when the condition [abrogating immunity] attached by Congress is accepted and acted upon by the two States.' 359 U.S. at 281-82.

Discussing *Petty* in *Edelman v. Jordan, supra,* the Supreme Court emphasized that

> 'The question of waiver or consent under the Eleventh Amendment was found in [*Petty*] to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity.' 415 U.S. at 672.

Appellants have pointed to no similar, express proviso attached by Congress when it approved the Compact. Thus, of there has been a waiver, it must be found in the language of the Compact

itself." [Appendix A, pp. 11-12; footnotes deleted.]

Petitioners acknowledge the applicability of the familiar rule that waiver of Eleventh Amendment immunity will be found only where express language or overwhelming implications direct. *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 54 (1944) and *Edelman v. Jordan, supra,* 415 U.S. at 673. Nonetheless, and even in the face of Congressional conditions apparently intentionally drafted to avoid the waiver effect of the consent condition in *Petty*, petitioners suggest that waiver lurks somewhere in the Compact.

At oral argument hereinbelow, petitioners urged that the use of the term "federal court" in Article VI(b) waives Eleventh Amendment immunity. That Article reads:

> "All ordinances, rules, regulations and policies adopted by the agency shall be enforced by the agency and by the respective states, counties, and cities. The appropriate courts of the respective states, each within its limits of territory and subject matter provided by state law, are vested with jurisdiction over civil actions to which the agency is a party and criminal actions for violations of its ordinances. Each such action shall be brought in a court of the state where the violation is committed or where the property affected by a civil action is situated, unless the action is brought in a federal court. For this purpose, the agency shall be deemed a political subdivision of both the State of California and the State of Nevada."

The structure and placement of this provision in the Compact are noteworthy. It is placed in an article encaptioned "Agency Powers". Analysis of the eleven paragraphs of that Article reveals that the title is descriptive. If, indeed, the provision quoted was intended to waive Eleventh Amendment immunity, it is out of context.

That Article VI(b) deals with TRPA authority rather than waiving TRPA immunity is equally apparent from its structure. The first sentence authorizes enforcement of TRPA regulations by TRPA and all pertinent governments. The second and third sentences thereof vest state courts with jurisdiction over such actions and contain venue provisions. The paragraph concludes that "for this purpose" TRPA is deemed a subdivision of both states. At the end of the state court venue provisions appear the words: "unless the action is brought in a federal court".

We do not quarrel with the observation that "for this purpose" is vague. Further, we concede that "this purpose" appears to deal with purposes of suit. We are unwilling to agree, however, that, as petitioners would have it, "this purpose" *must be* only for purposes of suit in federal court and that, therefore, this vague phrase waives Eleventh Amendment immunity. "This purpose" more logically relates to the state court venue provisions of the preceding two sentences. Moreover, since the predicate sentence of Article VI(b) deals with enforcement actions, the litigation "purposes" referenced most likely deal with the dif-

fering treatment accorded such actions by the courts of each state."

The most reasonable construction of Article VI(b) is that it grants state courts jurisdiction over TRPA, sets state venue, and deems TRPA an entity of both states for litigation purposes (e.g., venue and bonds). The reference to "federal court", rather than being an obtuse waiver of immunity and delegation of jurisdiction, most logically relates to the propriety of *TRPA* filing suit in federal court (the "enforcement" tenor of the language strongly supports such construction) and to actions exempt from Eleventh Amendment immunity (see Footnote 17 of the opinion hereinbelow and *Fitzpatrick v. Bitzer, supra*).

Neither the body of the Compact as adopted by the states nor the conditions imposed by Congress present the clear and unequivocal waiver of Eleventh Amendment immunity required by law.

---

3. THE INDIVIDUAL DEFENDANTS ARE ABSOLUTELY IMMUNE FROM LIABILITY FOR THEIR LEGISLATIVE ACTS.

Petitioners' critique of the Court of Appeals' ruling that the individual defendants are immune from damage suits arising from their legislative acts again shipwrecks on its characterization of TRPA. So, petitioners urge, that if they may characterize TRPA

"For example, bond requirements for governments ancillary to injunctions (which is the typical enforcement remedy) vary between the states [§ 529 California Code of Civil Procedure; Rule 65(c) NRCP]. Consequently, for this litigation "purpose" it is important that TRPA be a political subdivision of both states.

as a local government, such immunity was improvidently afforded. As noted above, however,[12] courts have consistently rejected petitioners' characterization of TRPA.

> "The [Tahoe Regional Planning] Compact deals with much more than local concerns such as zoning and land use. It addresses the environmental problems of an area not subject to the control of a single state." *League to Save Lake Tahoe v. TRPA, supra*, 507 F. 2d at 524.
>
> "Only an agency transcending local boundaries can devise, adopt and put into operation solutions for the problems besetting the region as a whole." *Younger v. County of El Dorado, supra*, 5 Cal. 3d at 495.
>
> "California makes a critical error in likening the Compact to ordinary zoning legislation and TRPA to a typical zoning board." *Younger v. TRPA, supra*, 516 F. 2d at 218.

The comparable bodies to TRPA, as noted by the Court of Appeals, are the state legislatures. Accordingly, consistent with prior authority of this Court, absolute immunity was accorded. *Doe v. McMillan*, 412 U.S. 306 (1973) and *Tenney v. Brandhove*, 341 U.S. 367 (1951).

Petitioners' authorities on the scope of legislative immunity all concern governmental entities and officers distinct from the judicial constructions of the Compact and TRPA. None involve purely legislative acts. None involve legislative entities over a region

[12] Pages 17-19, *supra*, completely rebut petitioners' characterizations of TRPA.

not encompassed within one state. None involve compacts or compact created entities. None are applicable.

The decisions of this Court regarding legislative immunity deal with the nature of legislators *not* whether the particular legislation reflects some "local" concerns. Manifestly, neither Congressional nor state legislative immunity magically disappear when the legislation has "local" impacts. *Tenney v. Brandhove, supra.* Nor should members of the interstate TRPA, an entity consistently judicially characterized contrary to petitioners' labels, be denied immunity merely because their interstate legislation may have local impacts.

CONCLUSION

The judgment and opinion hereinbelow correspond with pertinent authority and present issues neither novel nor of great public significance. The petition is appropriately denied.

Dated, May 17, 1978.

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Supreme Court, U. S.
FILED
MAY 30 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1327

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Petitioners,

vs.

TAHOE REGIONAL PLANNING AGENCY, COUNTY OF EL DORADO, and STATE OF CALIFORNIA, et al.,

Respondents.

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INTRODUCTION

Respondents raise a number of new matters in their briefs in opposition. None undercut, and some support, the importance of this Court's review of the decision below.[1]

1. In the interest of brevity, petitioners omit any extended discussion of respondent TRPA's statement of the case, other than to point out two misstatements. The statement at page 6 of respondents' brief that petitioners' parallel state court action "was dismissed and no appeal has been taken therefrom" is apparently intended to create the impression that there was a ruling by a state court upon these claims. That is false; the state court action referred to was voluntarily dismissed without prejudice by petitioners. Second, the discussion at pages 5-6 of respondents' brief implies that petitioners have failed to exhaust administrative remedies. That argument is entirely irrelevant to the issues here, and neither the District Court nor the Ninth Circuit ruled on that issue.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Presents Important Questions Concerning the Application of the Eleventh Amendment to Entities Created by Interstate Compact.

Respondents attempt to equate TRPA to a state for purposes of the Eleventh Amendment by dwelling on the importance of the Lake Tahoe Basin as a natural resource, not just to its immediate area but to the region and the nation. They also stress the political difficulties encountered in governing this resource because it falls across the border between California and Nevada. (Brief of Certain Respondents In Opposition to Petition, pp. 17-19.) Tested by the guiding principles of this Court's decisions, however, including *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), a separate political subdivision such as TRPA cannot be equated with the sovereign states for purposes of applying the Eleventh Amendment. While, as all here agree, TRPA's geographical jurisdiction crosses state and county lines, it does not on that account cease to be a subordinate unit of government, and it should not on that account escape the power of the federal courts to enforce the constitutional guarantee of due process of law. The Ninth Circuit's blanket application of the Eleventh Amendment to all entities created by interstate compacts is unprecedented and unsound.

A. THE NINTH CIRCUIT'S APPLICATION OF THE ELEVENTH AMENDMENT TO ALL COMPACT ENTITIES IS ERROR AND SHOULD BE REVIEWED.

Respondents make much of the assertion that only one district judge has previously declined Eleventh Amendment immunity to a compact entity. (Brief for Certain Respondents In Opposition to Petition, pp. 10, 12.) If only the ultimate result were important, petitioners would respond by citing this Court's decision in *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), where the result was a denial of such immunity. But it is not the result in the cited decisions that is significant, and petitioners do not quarrel with them. What is significant is the reasoned analysis of the particular agency employed by the courts of the Second and Eighth Circuits, in compliance with this Court's decisions in other Eleventh Amendment cases. The Ninth Circuit failed to do that, adopting instead a *per se* rule that compact entities are immune and alternatively relying on the Eighth Circuit's *Petty* decision, where the underlying facts were completely different from those here.

Respondents also urge that "[i]t does not require great sophistication to conclude that an agency created by separate sovereign states . . . is greater than or at least tantamount to its creators." (Brief of Certain Respondents In Opposition to Petition, p. 14.) Certainly it is true that *geographically* TRPA's jurisdiction extends farther than that of either state alone. Politically, however, that is not true, for here Nevada and California combined to create not a governmental equal or a common arm, but a separate *political subdivision* that overlaps their boundary. If either had created a similar entity alone, it would undoubtedly not be immune under the Eleventh Amendment and the controlling decisions of this Court. But because the states acted together, so respondents argue, the whole is somehow greater than the sum of its parts. It is not. No court, other than the Ninth Circuit in this case, has ever held that a political subdivision is immune under the Eleventh Amendment merely because it was created by interstate compact.

B. UNDER THE APPLICABLE STANDARDS, THE NINTH CIRCUIT ERRED IN GRANTING TRPA IMMUNITY.

Respondents contend that the Ninth Circuit's opinion granting TRPA Eleventh Amendment immunity is sup-

ported by the same "critical elements" relied upon by the Eighth Circuit in *Petty v. Tennessee-Missouri Bridge Commission*, 254 F.2d 857 (8th Cir. 1958), *reversed*, 359 U.S. 275 (1959). Since the Ninth Circuit relied upon its *per se* rule that the Eleventh Amendment immunizes all agencies created by interstate compact, it engaged in no reasoned analysis of the "critical elements" underlying the Eighth Circuit's opinion.

Respondents recognize that under this Court's decisions one central issue is whether this suit will "impose a liability which must be paid from public funds in the state treasury," *Edelman v. Jordan*, 415 U.S. 651, 663 (1973). Respondents argue that it will because, they say, (1) most of TRPA's funding comes from state and federal government; (2) the funding required of local governments is imposed by action of the states in adopting the Compact; and (3) the treasuries of the states are ultimately accountable for monetary relief against TRPA. (Brief of Certain Respondents in Opposition to Petition, p. 16.)

There is no support in the record for respondents' assertion that most of TRPA's funding comes from state and federal government. As the petition for certiorari points out, the only funding mandated by the Compact for TRPA is its power to assess local governments. (See Petition for Certiorari, pp. 6, 21; Compact Art. VII(a).) It is this by which TRPA's status must be determined.

Such minor appropriations, if any, as the states may make for TRPA are purely a matter of grace. They no more transform TRPA into a state agency for Eleventh Amendment purposes than the receipt of similar monies by the City of San Francisco would transform it into a state agency or the receipt of even "a significant amount of money from the State" transformed the Mt. Healthy City School District into an agency of Ohio. *Mt. Healthy City School*

District Board of Education v. Doyle, supra, 429 U.S. at 280. Nor are TRPA's receipts of federal funds, which it generally receives for services rendered under contracts with departments of the federal government,[2] relevant to the Eleventh Amendment issue.[3]

In any event, the sources of TRPA's revenues are not the real issue. The crucial point is not the source of the monies in TRPA's bank account, but the fact that a judgment against TRPA would be paid from that bank account and not from the state treasury of either California or Nevada. Respondents' assertion to the contrary, citing NRS 41.035(9)[4] and *Williams v. Horvath*, 16 Cal. 3d 834, 548 P.2d 1125, 129 Cal. Rptr. 453 (1976), is wrong as a matter of law. Both Chapter 41 of the Nevada Revised Statutes and Sections 825-825.6 of the California Government Code, construed in *Williams v. Horvath*, concern the indemnification only of *public officers and employees* by the employer state or political subdivision for liabilities incurred by them in the course of their public employment. Whatever TRPA may be, it is not a public officer or employee, as defined in either statute, and, therefore, it is not entitled to indemnification by either state. On the contrary, Article VII(f) of the Compact expressly insulates the states from any liability TRPA may incur.

The Ninth Circuit failed to consider this fact or any other aspect of TRPA's structure and funding, since it adopted a *per se* immunity rule.

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2. Article VII(b) of the Compact authorizes TRPA to collect fees for services rendered. See Petition for Certiorari, p. 6, n.2 and p. 21, n.21.

3. No one asserts that TRPA is a federal agency, and both the District Court and the Ninth Circuit ruled that it was not. See Petition for Certiorari, Appendix A at 13 and Appendix D at 62. No question of federal sovereign immunity is presented here.

4. The intended reference is presumably NRS 41.0337(9) (1977).

II. This Case Is Ripe for Review.

Respondents Briner and Henry suggest that this case is not ripe for review, citing *Brotherhood of Locomotive Firemen and Enginemen v. Bangor and Aroostook Railroad Company*, 389 U.S. 327 (1967). (Brief for Respondents James Henry and William Briner in Opposition to Petition for Certiorari, pp. 15-16.) There this Court denied the petitioning union's application for a writ of certiorari, stating in a per curiam opinion that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." 389 U.S. at 328. Here, too, the Court of Appeals has remanded the case, for development of factual findings as to the "legislative" or "executive" nature of the actions of the individual defendants. But this case is entirely different from the *Brotherhood* case and is properly governed by the rule stated in *United States v. General Motors Corp.*, 323 U.S. 373 (1945), and followed in *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949), and *Land v. Dollar*, 330 U.S. 731 (1947).

The appeal in *Brotherhood* was from assessment of a penalty for an alleged contemptuous violation by the union and its president of a restraining order forbidding a strike. The union petitioned for certiorari on issues concerning the legality of the contempt order that the Court of Appeals had decided against it. This Court denied review because the Court of Appeals had also remanded for a hearing on whether the petitioners were in fact in contempt at all. A ruling in their favor on remand would have mooted the issues for which they sought review, and those issues were all completely unrelated to the course of the main action.

In *General Motors*, in contrast, the Court of Appeals had remanded for trial to permit evidence on damage issues as to which the district court had refused an offer

of proof. In *Larson* and in *Land*, the Court of Appeals had remanded for trial of factual jurisdictional issues concerning sovereign immunity on which the district court had granted motions to dismiss. In all three cases this Court granted certiorari because the correctness of the rulings on the questions involved was "fundamental to the further conduct of the case." *United States v. General Motors Corp.*, 323 U.S. at 377; *Larson v. Foreign & Domestic Corp.*, 337 U.S. at 685, n.3; *Land v. Dollar*, 330 U.S. at 734, n.2.

Here, too, the Ninth Circuit's rulings are fundamental to the further conduct of the case. The Ninth Circuit's rulings, in effect, deny petitioners any remedy at all in damages in federal court for an unconstitutional taking of their property. TRPA, the agency which took the property, is given absolute immunity by the Ninth Circuit, and all the members of TRPA are also given absolute immunity except under narrowly confined circumstances where they may be said to be acting in an "executive" capacity. Thus, while the Ninth Circuit agrees that petitioners are entitled to a damage remedy under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), its broad extension of immunity to anyone who may be liable for the wrong renders that remedy entirely illusory. That ruling will obviously and profoundly affect the entire conduct of the case, the scope of discovery, the issues to be tried, and the relief petitioners can obtain. It is not tangential to the action, as were the rulings of the Court of Appeal in *Brotherhood, supra;* it goes to the heart of it. And, unlike the rulings in *Brotherhood*, the issues decided here cannot be rendered moot by the hearing on remand. TRPA's status under the Eleventh Amendment cannot under any circumstances be affected by findings

on the capacity in which the individual defendants acted, and it is extremely unlikely that the hearing on remand will moot even the question whether the individual defendants enjoy absolute immunity in their "legislative" capacities. In short, this case is indeed ripe for review in this Court.

CONCLUSION

For the reasons stated herein and in the Petition for Writ of Certiorari, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Dated: May 26, 1978.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1327

LAKE COUNTRY ESTATES, INC., a corporation, COUNTRY CLUB ESTATES, a partnership, and BOULDIN DEVELOPMENT CORPORATION, a corporation,
Petitioners,

vs.

TAHOE REGIONAL PLANNING AGENCY et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for the Petitioners

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 566 F.2d 1353. A previous opinion, withdrawn upon rehearing, is reported at 558 F.2d 928. These opinions are reproduced as Appendices A and C, respectively, to the petition for writ of certiorari. [A.P. 1-22; 25-57][1] The Court of Ap-

1. Petitioners will use the following abbreviations in this brief. Appendix: "A." Appendix to Petition for Writ of Certiorari: "A.P." Record: "R." References to the portion of the record generated in the District Court will be to the consecutive page numbers in the record transmitted to the Court of Appeals. References to the portion of the record generated in the Court of Appeals will name the document and cite the page to which the Court's attention is directed.

peals' order denying petitioners' petition for rehearing and the District Court's opinion are unreported. They are reproduced, respectively, as Appendices B and D to the petition for writ of certiorari. [A.P. 23-24, 58-62]

JURISDICTION

The judgment of the Court of Appeals was entered as of December 21, 1977. A petition for rehearing was denied as of January 30, 1978. The petition for certiorari was docketed March 21, 1978, and was granted June 5, 1978. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I

Does the Eleventh Amendment provide immunity to every agency created by interstate compact without regard to the particular circumstances of each one's organization, powers, functions, financing, and other elements of its relationship with the participating states?

II

The Tahoe Regional Planning Agency is a separate legal entity and a political subdivision of California and Nevada, funded primarily by counties, governed by a body a majority of whose members are appointed by cities and counties, and empowered to perform functions such as land use regulation previously and traditionally performed by those cities and counties. Does the Eleventh Amendment provide immunity to the Tahoe Regional Planning Agency, merely because it was created by an interstate compact?

III

The Tahoe Regional Planning Compact created the Tahoe Regional Planning Agency as a bi-state agency and separate legal entity, termed it a political subdivision of the two compacting states, referred to actions in the federal courts involving the agency, and was subject to Congressional consent which provided that the compact was in no way to affect the powers or the applicability of the laws of the United States. Did the Tahoe Regional Planning Compact waive any Eleventh Amendment immunity that might otherwise have attached to that Agency?

IV

Do appointed members of the governing body of the Tahoe Regional Planning Agency, a political subdivision of California and Nevada, have *absolute* immunity from any claim for damages for acts infringing constitutionally protected rights, merely because those acts may be characterized as "legislative"?

STATUTES INVOLVED

The statutes involved are these:

1. Article I, § 10, cl. 3 of the Constitution of the United States, providing: "No state shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State. . . ."

2. The Eleventh Amendment to the Constitution of the United States, providing:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

3. The Tahoe Regional Planning Compact, California Government Code §§ 66800-66801 (West Supp. 1977); Nevada Revised Statutes §§ 277.190-277.230 (1973); Congressional consent granted, Act of December 18, 1969, Public Law No. 91-148, 83 Stat. 360. The text of the Compact, with additional consent provisions added by Congress, is contained in Pub. L. No. 91-148, reproduced verbatim as Appendix E to the Petition for Certiorari. [A.P. 63-80]

4. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13, as codified in 42 U.S.C. § 1983, providing:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE[2]

This is an action against the Tahoe Regional Planning Agency, an agency created by a compact between California and Nevada approved by Congress, and against individual members of its governing body and its executive officer (the "individual defendants").[3] Petitioners allege

2. The case comes before this Court on review of a motion to dismiss the complaint. This statement of facts accordingly includes only (1) facts alleged in the complaint, (2) provisions of law contained in the Compact, and (3) proceedings in the courts below reflected in the record.

3. The States of California and Nevada, certain counties in the area, and others were also defendants in this case or in one of the three related cases consolidated with this one on appeal. Petitioners have raised no issues with respect to the dismissal of those other defendants and accordingly TRPA and the individual defendants are the only parties adverse to petitioners in this Court.

that the agency and the individual defendants have taken petitioners' property without just compensation and without due process of law.

In 1968 California and Nevada entered into the Tahoe Regional Planning Compact ("the Compact"). The purpose of the Compact was to regulate and control development in the Lake Tahoe Basin, a geographic region that lies partly in each state. See map, Appendix A. Cal. Gov't Code §§ 66800-66801 (West Supp. 1977); Nev. Rev. Stat. §§ 277.190-227.230 (1973). Congress consented to the Compact in 1969. Act of December 18, 1969, Pub. L. No. 91-148, 83 Stat. 360 (1969). [A.P. 63-80]

The Compact created a "separate legal entity" known as the Tahoe Regional Planning Agency ("TRPA"). [Compact, Art. III(a), A.P. 65] TRPA is deemed, for purposes of suit, to be a "political subdivision" of both states. [Compact, Art. VI(b), A.P. 75]. The Compact directed TRPA to adopt a regional plan providing for land use, transportation, conservation, recreation, public services and facilities, and similar matters in the Lake Tahoe Basin. [Compact, Art. V(b); A.P. 70-72] TRPA was empowered to adopt and enforce ordinances, rules, regulations, and policies on a number of subjects to effectuate the regional plan. [Compact, Art VI(a), A.P. 73-74]

TRPA has a governing board of ten members, none of whom are elected to it. Six are appointed by county and city governments in the area; two are appointed, respectively, by the governors of California and Nevada; and two are members by virtue of their offices in natural resources agencies of the states.[4] [Compact, Art. III(a), A.P. 65-66]

4. Each member appointed by a California county or city must be a member of the appointing city's or county's council or board of supervisors; the member appointed by each Nevada county,

The Compact provides for TRPA's funding to come principally from the five counties in the Lake Tahoe Basin. TRPA may assess the counties within the region up to a total of $150,000 each year and the California counties are authorized to levy local taxes to raise it. TRPA may also collect fees for services and accept gifts, donations, subventions, grants, and other financial aids and funds. [Compact, Art. VII(a), (b), and (d), A.P. 77] Apart from the expenses of each member of the governing body, which are to be met by the body he represents, all expenses incurred by the governing body in the course of exercising its powers are to be paid by TRPA out of its own funds. [Compact, Art. III(b), A.P. 66] Obligations contracted by the agency do not bind the states or any of their political subdivisions. [Compact, Art. VII(f), A.P. 78]

Petitioners Lake Country Estates and Country Club Estates own real property within what is now TRPA's jurisdiction. [A. 8, 13][5] In 1971, Lake Country submitted plans for development of the property to El Dorado County. The County approved them. Lake Country submitted the plans to

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however, need only be a resident of the appointing county. [Compact, Art. III(a), A.P. 65-66] The governing body also has a nonvoting member appointed by the President of the United States. Act of December 18, 1969, Pub. L. No. 91-148, § 3, 83 Stat. 360 [A.P. 79] TRPA also has an advisory planning commission of at least seventeen members appointed by the governing body. Ten are officers of local agencies designated in the Compact and at least four are lay residents of the region. [Compact, Art. III(h), A.P. 67-68]

5. Petitioner Bouldin Development Corporation is the beneficiary of a deed of trust on the Lake Country Estates property. [A. 8] The complaint was amended by stipulation to add Bouldin Development Corporation as a plaintiff on October 15, 1973. [R. 105-137] For convenience, petitioners Lake Country Estates, Country Club Estates, and, where appropriate, Bouldin Development Corporation, will be referred to collectively as "Lake Country."

TRPA's Advisory Planning Commission, which also approved them. [A. 8, 13]

On February 10, 1972, however, TRPA adopted its regional plan. The regional plan included a "Land Use Ordinance" ("LUO") (reproduced at R. 62-98). [A. 9, 13] Under the LUO Lake Country's land was classified as "General Forest" and "Conservation Reserve." [A. 9, 13] The LUO prohibited any development or use of property so classified for any purposes except hiking trails, camps, riding trails, forest management programs, fire lookouts, and the like. [R. 77-78, 87]

Lake Country again applied to TRPA for permission to develop the property. TRPA rejected the application and reclassified all of the property as "Conservation Reserve." This effectively prohibited development and any beneficial use of the property and destroyed any value of the property. [A. 9, 13-14] TRPA also announced its intention to acquire the property. [A. 9-10, 14]

On April 16, 1973, Lake Country filed a complaint in the United States District Court for the Eastern District of California against TRPA, El Dorado County, the States of California and Nevada,[6] and the individual defendants. [R. 1-28] Lake Country alleged that the defendants had taken the property without just compensation and without due process of law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. [A. 5-6, 10, 15, 19, 20; R. 2, 7, 10, 12, 14-15, 15;] Similar claims were alleged under the Compact and the constitutions and laws of the States of Nevada and California. [A.

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6. Although the states were named as defendants they were never served in this action. They were before the Court of Appeals, however, as defendants in other actions with which this one was consolidated.

16-18; R. 12-14] Lake Country sought damages [A. 23-25; R. 18-19] and injunctive and declaratory relief. [A. 25-28; R. 19-22] Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343,[7] as well as 28 U.S.C. § 2201 and the court's pendent jurisdiction [A. 5-6; R. 2-3]

Defendants filed motions to dismiss this action and other actions brought by other property owners asserting similar claims. [R. 29-33, 99-101, 102-104, 139-41] On December 11, 1975, the District Court dismissed all of the cases. [A.P. 58-62; R. 630-34] Although it held that the complaints all "state[d] facts sufficient for a cause of action in inverse condemnation," it ruled that "an inverse condemnation action cannot be brought against TRPA" because it lacks the power of condemnation. [A.P. 59; R. 631] It therefore dismissed all the complaints against TRPA without leave to amend. [A.P. 60; R. 632] It dismissed claims against the individual defendants on the ground that "members of governmental bodies are immune from liability for damages arising out of their exercise of discretionary functions." [A.P. 61; R. 632] It also dismissed all other defendants. [A.P. 60-62; R. 632-33]

Lake Country appealed to the Ninth Circuit Court of Appeals [R. 635-37], where the case was consolidated with others involving TRPA. In its first opinion, issued on August 5, 1977, the Ninth Circuit reversed the District Court in part, holding that the complaint stated claims against TRPA for damages and for injunctive and declaratory

7. The District Court had jurisdiction under 28 U.S.C. § 1331 because each plaintiff's claim exceeded $10,000, exclusive of interest and costs, and arose under federal constitutional provisions and the federal law of the Compact. It had jurisdiction under 28 U.S.C. § 1343 because plaintiffs asserted claims under 42 U.S.C. § 1983 for violation of constitutional rights under color of state law.

relief under the due process clause of the Fifth Amendment.[8] [A.P. 34-35; 558 F.2d at 936] It affirmed dismissal of the States (but not TRPA) in the related actions on the basis of the Eleventh Amendment and dismissal of the County on other grounds. [A.P. 31-40; 558 F.2d at 938-41] With respect to Lake Country's damage claims against the individual defendants, the court held that the individual defendants were entitled to absolute immunity to the extent they were acting in a "legislative" capacity and qualified immunity to the extent they were acting in an "executive" capacity. [A.P. 45-49; 558 F.2d at 941-44]

TRPA petitioned for rehearing. On December 21, 1977, the Court of Appeals withdrew its August 5, 1977, opinion and issued a second opinion in its place. [A.P. 1-22; 558 F.2d 1353] In its second opinion the Court of Appeals ruled, for the first time and *sua sponte*, that TRPA is immune from suit under the Eleventh Amendment. [A.P. 6-9; 566 F.2d at 1359-60]

TRPA had never claimed such immunity at any stage. California and Nevada had vigorously denied in related actions that TRPA was an arm of either state or anything but a local governmental entity. [See A.P. 81-83; Brief of Appellee State of California, August 2, 1976, in No. 76-1608, *Layton-Tahoe Properties v. Tahoe Regional Planning Agency et al.*, pp. 7-9; Brief of Appellee State of Nevada, July 2, 1976, in No. 76-1608, *Layton-Tahoe Properties v. Tahoe Regional Planning Agency et al.*, p. 7] The Court of

8. The Court of Appeals held that petitioners stated no claim under the just compensation clause of the Fifth Amendment because TRPA did not have power to condemn the property. [A.P. 31; 558 F.2d at 936] In its second opinion it indicated that a claim was stated under the due process clause of the Fourteenth Amendment as well as of the Fifth Amendment, but that none was stated under the just compensation clause of either. [A.P. 4-6; 566 F.2d at 1358-59.]

Appeals itself had not suggested in its earlier opinion that TRPA was immune from suit. Nevertheless, on the basis of this Court's decision in *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), the Court held that TRPA was immune from suit. It construed *Petty* to hold that "bi-state compacts . . . preserve Eleventh Amendment immunity for entities created under them." [A.P. 8; 566 F.2d at 1360] It also stated that even if *Petty* were not a binding decision, it "still would find immunity for the reasons set forth in the opinion of the Eighth Circuit. *Petty v. Tennessee-Missouri Bridge Comm'n*, 254 F.2d 857 (8th Cir. 1958)." [A.P. 8; 566 F.2d at 1360] The Court also held, in contrast to *Petty*, that California and Nevada had not waived TRPA's immunity by entering into the Compact. [A.P. 11-12; 566 F.2d at 1361-62] Accordingly, it dismissed TRPA as a defendant.

Thus the Court of Appeals held that in federal court property owners whose property has been taken by an agency such as TRPA can recover damages or other compensation or relief for the taking only against the officials of the agency. None of the other defendants, the states, the counties, or the agency itself, is accountable in damages for the taking in any federal court. Moreover, property owners can recover from those officials only to the extent they acted in an "executive" capacity in taking the property, and only if they can be shown to have acted in bad faith or to have departed from evenhanded enforcement of the regulations they enacted. Otherwise, even those officials have an "absolute" immunity, and no one is liable for the taking of the property.

SUMMARY OF ARGUMENT

Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959), did not decide that every interstate agency

has Eleventh Amendment immunity. An examination of the particular characteristics of each compact agency is required in order to determine its Eleventh Amendment status, just as for governmental bodies created by a single state.

Examination of TRPA shows that it is not an arm of the states entitled to Eleventh Amendment immunity. It is expressly a "separate legal entity" and a "political subdivision" of the states for purposes of suit. Its jurisdiction is local and its functions are local functions. Its governing body is made up largely of local officials and their actions are not subject to veto at the state level. TRPA's funding under the Compact is from local governments, and both the States and their political subdivisions are expressly insulated from its obligations.

Even if the agency were an arm of the states, moreover, the Compact waives any Eleventh Amendment immunity TRPA might otherwise have. The Compact contains a provision authorizing TRPA to be made a party to suits in the federal courts. Congress also attached a proviso reserving federal jurisdiction. In addition, this action is authorized by 42 U.S.C. § 1983, a statute enacted by Congress exercising its powers under Section 5 of the Fourteenth Amendment. Even if TRPA's asserted immunity had not been waived generally, therefore, TRPA has no immunity as to suits of this kind in which petitioners assert that they have been deprived of their constitutional rights in violation of the Fourteenth Amendment.

Finally, the Court of Appeals erred in according to the members of TRPA's governing body absolute immunity from damages for acts in a "legislative" capacity. The absolute immunity of members of Congress and state legislatures is a special privilege of those bodies mandated by

the speech and debate clauses of federal and state constitutions in order to preserve the separation of powers. Neither precedent nor policy supports extending absolute immunity to members of an appointed administrative body such as TRPA's governing body.

ARGUMENT

I. THE ELEVENTH AMENDMENT DOES NOT IMMUNIZE THE TAHOE REGIONAL PLANNING AGENCY FROM SUITS AGAINST IT IN THE FEDERAL COURTS.

A. The Applicability of the Eleventh Amendment to Interstate Agencies Must Be Decided on a Case-by-Case Basis Using the Same Standards Applied to Agencies Created by a Single State.

In its decision below, the Court of Appeals held that the Eleventh Amendment immunizes all bi-state and multi-state agencies created by interstate compacts from suit in the federal courts. [A.P. 7-8] Since TRPA is one of those agencies, the Court of Appeals dismissed Lake Country's action against it.

The Court of Appeals' categorical rule was based only on its reading of this Court's decision in *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959). Lake Country submits that the Court of Appeals read into *Petty* a proposition for which it does not stand. Instead of the Ninth Circuit's *per se* rule, the status of compact entities under the Eleventh Amendment must be decided on a case-by-case basis, applying the same standards used by this Court to determine the status of intrastate bodies.

Petty was a negligence action brought under the Jones Act. The defendant was a bi-state corporation, created by compact, that operated a bridge and ferries across the

Mississippi River between Tennessee and Missouri. The question presented to this Court was whether the Eleventh Amendment prevented the action from being prosecuted against the corporation in federal court.

There were three opinions in this Court. Justice Douglas, writing for the majority, "assume[d] *arguendo* that this suit must be considered as one against the States. . . ." 359 U.S. at 279. He phrased the question decided as "whether Tennessee and Missouri have waived their immunity under the facts of this case," 359 U.S. at 277, and held that they had waived it. That is the only subject the majority opinion treated. Three justices concurred on the express "understanding that we do not reach the constitutional question as to whether the Eleventh Amendment immunizes from suit agencies created by two or more States under state compacts which the Constitution requires to be approved by the Congress." 359 U.S. at 283. Three justices dissented from the majority's finding of waiver, construing the majority opinion as "acknowledging the applicability of the provisions of the Eleventh Amendment to the Tennessee-Missouri Bridge Commission. . . ." 359 U.S. at 283.

The Court of Appeals recognized that the three concurring justices had expressly reserved the applicability of the Eleventh Amendment to interstate agencies. It believed, however, that the three dissenting justices had decided that it applied to all interstate agencies, apparently reasoning by extension from their conclusion that it applied to the Bridge Commission. It also believed that the three majority justices had reached the same conclusion, apparently *sub silentio*. The Court of Appeals therefore considered itself "bound by *Petty*" to find TRPA and all other compact agencies immune from suit under the Eleventh Amendment.

There are three serious defects in the Court of Appeals' reasoning. First, the majority opinion in *Petty* only "assume[d] *arguendo*" the applicability of the Eleventh Amendment. The concurring opinion makes clear that this assumption for the sake of argument was not to be taken as deciding that constitutional question. Second, even the majority opinion's *arguendo* assumption is not phrased in terms of a categorical rule for all interstate agencies. On the contrary, the majority's assumption was based only on the conclusion that "*this* bi-state agency is a joint or common agency of Tennessee and Missouri." (Emphasis added.) 359 U.S. at 279. That conclusion, in reference to the Bridge Commission, was amply supported by analysis of the Bridge Commission's status in the decision of the Eighth Circuit, *Petty v. Tennessee-Missouri Bridge Commission*, 254 F.2d 857, 859-60 (8th Cir. 1958). It does not suggest a class-wide rule but, on the contrary, is entirely consistent with a case-by-case analysis, based on established principles, of the characteristics of each agency that comes before the Court. Third, the only portions of this Court's fourteen-page decision that deal with the applicability of the Eleventh Amendment to compact entities are the three short passages that have been cited. All else pertains to waiver. These three lonely sentences, devoid of explanation or reference to authority, are not the sort of underpinning one would expect to find in an opinion of this Court for a broad rule of constitutional law that had never before been addressed.

The Court of Appeals' *per se* rule suffers from a more fundamental defect than absence of authority, however. In singling out compact agencies for special protection for no discernible reason, it is also in conflict with the general approach employed by this Court in deciding on a case-by-case basis whether other governmental bodies are arms or *alter egos* of a state entitled to the state's Eleventh Amendment immunity.

Not every element of state government is entitled to Eleventh Amendment immunity. Counties, municipal corporations, and other political subdivisions of a state are subject to suit in the federal courts. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 280 (1977); see also *Edelman v. Jordan*, 415 U.S. 651, 667, n. 12 (1974); *Moor v. County of Alameda*, 411 U.S. 693, 717-21 (1973); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890). These decisions demonstrate that in order to determine whether the Eleventh Amendment applies to a governmental unit other than a state itself, one must look to the characteristics of the particular agency and the closeness of its relationship to the state.

In *Mt. Healthy* this Court was asked to decide whether the Eleventh Amendment applied to a local school board. In considering this question, it explained

> "The issue here . . . turns on whether the [agency] is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend. The answer depends, at least in part, upon the nature of the entity created by state law." 429 U.S. at 280.

It therefore looked to Ohio statutes providing that school districts are "political subdivisions" and to the board's power to issue bonds and levy taxes as a source of financing independent of the state treasury. Although the board was "subject to some guidance from the State Board of Education" and received "a significant amount of money from

the State," the Court concluded that the school board was "more like a county or city than it is like an arm of the state," and accordingly refused it Eleventh Amendment immunity. 429 U.S. at 280.

Similar analysis was employed in *Moor v. County of Alameda,* 411 U.S. 693, 717-21 (1973). There it was decided that a federal district court had diversity jurisdiction over a suit against a California county. The Court took note of various provisions of California law governing a county's powers, including statutes describing its relationship to the State for purposes of suit, as well as applicable court decisions. On the basis of its analysis the Court rejected the county's contention that it was simply an arm or *alter ego* of the State not subject to diversity jurisdiction.[9]

The same case-by-case approach is applicable to agencies created by interstate compacts. Unlike the Court of Appeals' categorical rule, it acknowledges that all interstate compact entities are not alike. Some, like the Tennessee-Missouri Bridge Commission, are intimately tied to the government of the States and are appropriately treated as their arms. Others, like a unified school district authorized by compact for Hanover, New Hampshire, and Norwich, Vermont,[10] are for all practical purposes indistinguishable from intrastate local governmental units to which the Eleventh Amendment does not apply. There is no reason to treat compact entities differently from the intrastate agencies they most closely resemble solely because they are created by compact.

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9. *Moor* did not expressly address the applicability of the Eleventh Amendment. That it did not apply is implicit in the Court's holding that the federal court had diversity jurisdiction. *Moor* has been so read in later decisions. *Mt. Healthy, supra,* 429 U.S. at 280; *Edelman, supra,* 415 U.S. at 667, n.12.

10. New Hampshire-Vermont School District Compact, Act of November 13, 1963, Pub. L. No. 88-177, 77 Stat. 332.

The decision of the Eighth Circuit in *Petty, supra,* and the recent decision of the Second Circuit in *Trotman v. Palisades Interstate Park Commission,* 557 F.2d 35 (2d Cir. 1977), also show that for Eleventh Amendment purposes the origin of the agency in an interstate compact is not important.[11]

In deciding that the Tennessee-Missouri Bridge Commission was immune from suit under the Eleventh Amendment, the Eighth Circuit in *Petty* weighed, among other factors, the state character of the functions the Commission was found to perform; its control by the governors of the compacting states; the fact that the bridge it built was to belong to the states when paid for; the Commission's sources of financing; and the effect of a judgment against it on the governmental operations of the states. Because it found on the basis of this analysis that the Commission was "an instrumentality of both Tennessee and Missouri and . . . not an entity separate and distinct from the States," it held the Eleventh Amendment applicable. 254 F.2d at 860.

The Second Circuit in *Trotman* took a similar analytic approach in deciding whether the Eleventh Amendment applied to the Palisades Interstate Park Commission, a bi-state agency created by compact between New York and New Jersey. It found that "there are many factors which must be considered in determining whether a state instrumentality can raise the bar of the Eleventh Amendment," 557 F.2d at 38, citing its earlier decision in *Fitzpatrick v. Bitzer,* 519 F.2d 559 (2d Cir. 1975), *reversed in part on other grounds,* 427 U.S. 445 (1976), where it had ruled on the Eleventh Amendment's applicability to the Connecticut

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11. Indeed, to the extent the interstate origin of the agency is relevant, it would dictate that the agency should *not* have Eleventh Amendment immunity. See pp. 25-26 below.

State Retirement Fund. Relying primarily on the fact that a judgment against the Commission would be paid from the state treasury, the *Trotman* court found the Commission immune under the Eleventh Amendment because

> ". . . an analysis of all the pertinent factors as set out in the compact and applicable New York laws leads us to the inevitable conclusion that in reality this suit against the Commission is one against the State of New York." 557 F.2d at 38.[12]

In short, the Court of Appeals erred in holding that TRPA's creation by compact made unnecessary an examination of its particular characteristics in order to determine its Eleventh Amendment status.

B. The Tahoe Regional Planning Agency Is Not an Arm of the States Entitled to Eleventh Amendment Immunity.

The application of the Eleventh Amendment to TRPA turns on whether TRPA is an arm or alter ego of California and Nevada or is instead a "municipal corporation or other political subdivision" to which the Eleventh Amendment does not extend. *Mt. Healthy, supra,* 429 U.S. at 280.

12. Other lower court decisions also support this approach. In *Byram River v. Village of Port Chester, New York,* 394 F. Supp. 618 (S.D.N.Y. 1975), Judge Knapp used a similar analysis in reaching the conclusion that the Eleventh Amendment provided no immunity for a tri-state agency created by compact. The Second Circuit cited *Byram River* with approval in *Trotman.* In fact, no reported decision, other than the Ninth Circuit's in this case, has found the origin of the agency in a compact to confer Eleventh Amendment immunity. See also *United States Steel Corporation v. Multistate Tax Commission,* 367 F. Supp. 107, 113 (S.D.N.Y. 1973) (dictum):

> "Even if there were no question of the constitutional validity of the Commission, the mere fact that an agency is a valid state agency would not automatically entitle it to eleventh amendment immunity as a matter of law. In each case, the facts must be closely scrutinized to determine whether the agency in question is, in effect, an arm or alter ego of the state so as to entitle it to immunity." 367 F. Supp. at 113 (citations omitted).

A three-judge district court later granted summary judgment on other grounds 417 F. Supp. 795 (S.D.N.Y. 1976), *affirmed,*— U.S.—, 98 S.Ct. 799 (February 21, 1978).

The Compact establishes that TRPA is not an arm or alter ego of California and Nevada. It is expressly made a "separate legal entity." [Compact, Art. III(a), A.P. 65] Furthermore, TRPA is deemed a "political subdivision" of the compacting states[13] for the purpose of suits in the federal courts:

> "Each [civil] action [to which TRPA is a party] shall be brought in a court of the state . . . where the property affected . . . is situated, *unless the action is brought in a federal court. For this purpose, the agency shall be deemed a political subdivision* of both the State of California and the State of Nevada." (Emphasis supplied) [Compact, Art. VI(b), A.P. 75]

Thus, the Compact itself answers the question whether TRPA is to be treated as a "political subdivision" which is not immune from suit. It expressly provides that TRPA is to be so treated.

The Compact's other provisions confirm that TRPA is not an arm of the states. Although its "regional" jurisdiction includes portions of two states and five counties, it is highly localized; the "region" it regulates is but a tiny corner of the states, smaller than all but one of the counties it overlaps.[14] See Map, Appendix A. The land use regulation

13. *Cf. Mt. Healthy,* 429 U.S. at 380: "Under Ohio Law the 'state' does not include 'political subdivisions' and 'political subdivisions' do include local school districts."

14. TRPA strenuously argued in opposition to the petition for certiorari that it is "far more than a local government." Brief of Certain Respondents in Opposition to Petition, p. 19. It claims instead to be a "regional" sort of government. Even if there is a distinction between "local" and "regional" government for other purposes, however, it is a distinction without a difference for purposes of the Eleventh Amendment. Whatever it is, TRPA is less than, and certainly distinct from, the government of any state.

at issue here is traditionally performed by local government. Its authority to make rules is not subject to veto at the state level. [See Compact, Art. VI, A.P. 73] A majority of the members of the governing body (six of ten voting members) are appointed by *counties and cities* rather than the states [Compact, Art. III(a), A.P. 65-66]; ten of the 17 members of the Advisory Planning Commission specified in the Compact are also associated with local agencies, and four others are to be residents of the region, while only one is from state government. [Compact, Art. III(h), A.P. 67-68]

The Compact also provides that TRPA's funding is to come from the counties rather than the states.[15] [Compact, Art. VII(a), A.P. 77] Indeed, the Compact expressly insulates the states from liability, providing that "[n]o obligation contracted by the agency shall bind either of the party states or any political subdivision thereof." [Compact, Art. VII(f), A.P. 78] It likewise provides that expenses incurred by the governing body in the exercise of its powers, other than the expenses of its individual members, are to be met by TRPA out of its own funds. [Compact, Art. III(b), A.P. 66] All these provisions indicate a considered decision to separate TRPA from organs of government at the state level.[16]

15. TRPA may also collect fees for services rendered and is authorized to accept gifts, donations, subventions, grants, and other financial aid and funds. [Compact, Art. VII(b) and (d). In its brief in opposition to the petition for certiorari, TRPA asserted that most of its funding comes from the state and federal government. Brief of Certain Respondents in Opposition to Petition, p. 16. There is no support in the record for this contention, and the only funding TRPA can count on under the Compact is that assessed on the counties. Minor appropriations by the state as a matter of grace cannot transform TRPA, any more than a city or county, into a state agency. Moreover, whatever the sources of the monies in TRPA's bank account, a judgment against it must be satisfied from that account and not from the treasury of either state. See immediately following text. *Compare Trotman, supra,* 557 F.2d at 38, where the decisive factor was apparently that the Commission's only revenues provided for by the compact, aside from gifts, were appropriations by the states' legislatures and use fees, which were required to be paid over to the state treasury, from which any judgment against the Commission would be paid.

Both the compacting states, moreover, have vigorously contended in this and related litigation that TRPA is not an arm of either state. As the State of California put it, TRPA is "no more a California state agency than are the City of Los Angeles or the County of Placer . . . [I]t is separate and distinct from the state, rather than being one of its arms. . . ." [A.P. 82; Brief of Appellee State of California, August 2, 1976, filed in No. 76-1608, *Layton-Tahoe Properties v. Tahoe Regional Planning Agency et al.,* pp. 7-9] Nevada has taken the same position. [See A.P. 82-83; Brief of Appellee State of Nevada, July 2, 1976, filed in No. 76-1608, *Layton-Tahoe Properties v. Tahoe Regional Planning Agency et al.,* p. 7]

These factors all distinguish TRPA from the Tennessee-Missouri Bridge Commission, which the Eighth Circuit decided in *Petty* was entitled to Eleventh Amendment immunity. The Eighth Circuit there concluded that the Bridge Commission was an arm or instrumentality of the state governments. It performed a state governmental function, providing bridges and highways. 254 F.2d at 859. In contrast, TRPA performs traditionally local governmental functions. In *Petty,* the bi-state agency was governed by a body consisting entirely of appointees of the compacting states' governors, and its actions were subject to veto by the

16. In addition, if the Court of Appeals were correct, which it is not, in ruling that TRPA acts under authority only of federal law under the Compact and not under authority of state law as well, that would be an additional factor showing that TRPA is not identifiable with the States whose Eleventh Amendment immunity it is now claiming. See pp. 30-31, below.

governors. 254 F.2d at 859. TRPA, on the other hand, is governed by a body not made subject to veto power by the states, and a majority of its members are appointed by *local* governments. Aside from bridge tolls, which were pledged for operating expenses and bond retirement, the Bridge Commission's only sources of operating revenues provided for by the compact were the states and the federal government. 254 F.2d at 860. The Compact here, however, provides for TRPA's financing by the counties, insulates the states from its obligations, and requires it to pay for its expenses out of its own funds.[17] Execution on a judgment against the Commission, according to the Eighth Circuit, would have been on the bridge it operated, which was to belong to the states when bonded indebtedness was paid. 254 F.2d at 860. No such factor is present here. The Bridge Commission was found by the court not to be "an entity separate and distinct from the States." 254 F.2d at 860. TRPA is expressly made a "separate legal entity," and none of its obligations bind the states.

In short, examination of TRPA's powers and functions shows that it is not an arm or alter ego of the States of California and Nevada and is not entitled to their Eleventh Amendment immunity from suit in a federal court.

C. Under the Compact the States Have Waived any Eleventh Amendment Immunity the Tahoe Regional Planning Agency Might Otherwise Have.

As Justice Douglas stated in *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 276 (1959), states may waive Eleventh Amendment immunity, *Missouri v. Fiske*, 290 U.S. 18, 24 (1933), as by a general appearance in litigation in a federal court, *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883), or by statute. *Ford Motor v. Department of Treasury*, 323 U.S. 459, 468-70 (1945). They may also waive it under an interstate compact. *Petty, supra*, 359 U.S. at 280-82.

17. Even if TRPA received "a significant amount of money from the State," that would not be determinative. See *Mt. Healthy, supra*, 429 U.S. at 280.

In *Petty*, the states waived immunity by including in the compact a clause authorizing the Bridge Commission "to sue and be sued in its own name." Although apparently neither state construed such a sue-and-be-sued clause as authorizing suit against a public corporation, this Court, interpreting the clause as federal law, held that it did. In addition, it took note of a condition imposed by Congress on its consent providing that nothing in the compact should "be construed to affect, impair, or diminish any right, power, or jurisdiction of the United States or of any court, department, board, bureau, officer, or official of the United States over or in regard to any navigable waters or any commerce between the States. . . ." 359 U.S. at 277. The Court read this clause as preserving the jurisdiction of the federal courts in matters over which they would otherwise have jurisdiction "by virtue of the fact that the Mississippi is a navigable stream and that interstate commerce is involved. . . ." 359 U.S. at 281.

The Tahoe Regional Planning Compact contains similar provisions. Nevertheless, the Court of Appeals found no waiver of immunity for TRPA. It gave as its reason the asserted absence of a sue-and-be-sued clause and of a provision attached by Congress waiving TRPA's immunity. [A.P. 11-12; 566 F.2d at 1361-62] Its conclusion is wrong on both counts.

Although the Compact does not use the words "sue and be sued," Article VI(b) of the Compact, quoted above at p. 19, is an equivalent. It expressly contemplates "civil

actions to which the agency is a party," and significantly for waiver purposes it expressly mentions actions "brought in a federal court." Moreover, it is in this section and "[f]or this purpose" that TRPA is "deemed a political subdivision" of the compacting states, a type of governmental agency that does not have Eleventh Amendment immunity. See *Mt. Healthy, supra,* 429 U.S. at 280. This express reference to actions involving the agency as a party in the federal courts is a far clearer indication of waiver than the sue-and-be-sued clause in which waiver was found in *Petty.*

In addition, Congress in consenting to this Compact included a reservation of powers similar to the one construed as requiring a waiver in *Petty.* It provides that nothing in the Compact should "in any way affect the powers, rights, or obligations of the United States, or the applicability of any law or regulation of the United States in, over, or to the region. . . ." [A.P. 79-80] Although not identical to the *Petty* provision, it "in essence convey[s] the same meaning." 359 U.S. at 287 (Frankfurter, J., dissenting). To the extent it differs, it is even broader than the *Petty* provision, not being limited to preserving the applicability of federal laws on any particular subject. The "powers of the United States" it preserves presumably include the judicial power and the "applicability of any law" presumably includes both constitutional provisions and jurisdictional statutes for the federal courts.

The provisions of Article VI(b) bearing on waiver must also be construed in light of other provisions of the Compact, discussed above, dealing with the constitution, funding, and other aspects of TRPA, which indicate that the compacting states and Congress never intended that the Eleventh Amendment would apply to TRPA. At the

very least, they must be interpreted as indicating an intention to waive any immunity that does attach to TRPA. Any other result renders meaningless the Compact's reference to suits in the federal courts. See *Edelman v. Jordan,* supra, 415 U.S. at 673: ". . . we will find waiver only where stated 'by the most express language *or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction*' " (emphasis supplied).[18]

Finally, the fact that these waiver provisions appear in an interstate compact should lead the Court to resolve any remaining doubts, if there were any, in favor of waiver. While waiver of Eleventh Amendment immunity will generally not be lightly inferred, this Court in *Petty* also made clear that in interpreting an interstate compact it "must treat the compact as a living interstate agreement which performs high functions in our federalism. . . ." 359 U.S. at 279. Interests of federalism and comity are served by permitting suits against interstate agencies to be resolved in federal courts. Otherwise, decision of such disputes requires one state's court to call before it and adjudicate the liability of an agency that by hypothesis is an arm of at least one other state and perhaps of several other states. In addition to potential jurisdictional problems,[19] there is fertile ground for dissension and conflict among the compacting states, particularly where, as here, the relationship is already tense. See generally, Note, Regional Government for Lake Tahoe, 22 Hastings L.J. 705, 708-15 (1971); *Cali-*

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18. The States' position that TRPA is not an arm of either state and TRPA's own failure to assert the Eleventh Amendment in any of the courts below, indicating that the agency itself never believed it had such immunity, also favor this construction of Article VI(b). See p. 21, above.

19. See *Western Union Co. v. Pennsylvania,* 368 U.S. 71, 80 (1961); *Nathan v. Virginia,* 1 Dall. 77, 1 L.Ed. 44 (Ct. of Common Pleas, Philadelphia, 1781).

fornia ex rel. Younger v. Tahoe Regional Planning Agency, 516 F.2d 215 (9th Cir.), *cert. denied,* 423 U.S. 868 (1975). A relatively neutral federal forum would minimize such potential conflicts between the courts of the states. See *League to Save Lake Tahoe v. B.J.K. Corporation,* 547 F.2d 1072, 1074-75 (9th Cir. 1976). These considerations could well justify a rule that the Eleventh Amendment should never apply to suits against an interstate agency. At the very least, however, the Court should not lightly assume that Congress (or the compacting states) intended that suit against an interstate agency should have to be brought in state courts. Nothing in this Compact indicates that result; in fact, all indications, including the express terms of the Compact, are to the contrary.

D. The Eleventh Amendment Is No Bar to This Suit for the Additional Reason That Petitioners Assert Claims Under 42 U.S.C. § 1983 for Deprivation of Their Civil Rights.

Another, independently sufficient basis for denying Eleventh Amendment immunity in this case has arisen since the petition for certiorari was filed, in light of *Monell v. Department of Social Services of the City of New York,* — U.S. —, 98 S.Ct. 2018 (June 6, 1978).

Lake Country's claims include claims of deprivation of constitutional rights under color of state law based upon Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983.[20] Section 1983 provides a remedy against "any *person* who, under color of any statute, ordinance, regulation, custom,

20. In addition, Lake Country stated claims directly under the Fifth and Fourteenth Amendments under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), over which the Court of Appeals held it had federal question jurisdiction pursuant to 28 U.S.C. § 1331. [A.P. 15-16; 566 F.2d at 1363-64] It held, however, that Lake Country could not maintain its § 1983 claims against the defendants on the grounds that they do not act under color of state law. See pp. 30-31, below.

or usage, of any State" deprives another person of rights secured by the Constitution. This Court held in *Monell* that Congress intended "municipalities and other local government units" to be included among those persons to whom Section 1983 applies. 98 S.Ct. at 2035.

The holding in *Monell* was limited "to local governmental units which are not considered part of the State for Eleventh Amendment purposes." 98 S.Ct. at 2036, n. 54. However, both the Court's reasoning and the legislative history of Section 1983 reviewed in *Monell* compel the conclusion that the section should apply equally to suits against any person, regardless of whether or not it would be considered part of the state for Eleventh Amendment purposes. *See Hutto v. Finney,* — U.S. —, 98 S.Ct. 2565, 2580 (June 23, 1978) (Brennan, J., concurring). The Court pointed out in *Monell,* for example, that Congressional supporters of the Section were "quite clear that § 1 of the act [§ 1983] extended a remedy not only *where a State had passed an unconstitutional statute,* but also where *officers of the State* were deliberately indifferent to the rights of black citizens." 98 S.Ct. at 2033, n. 45 (emphasis added)[21] The Court in *Monell*

21. Among the supporters the Court quoted were Representatives Bingham, Shellabarger, and Edmunds. Representative Bingham stated that the act's purpose was the enforcement of the Fourteenth Amendment on behalf of every citizen "to the extent of the rights guaranteed to him by the Constitution. . . . Who dare say, now the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of rights as these in the States *and by the States,* or combinations of persons." 98 S. Ct. at 2033, n. 45. (emphasis added) Representative Shellabarger explained the function of § 1 of the act [§ 1983] in the following terms: [It] . . . provides a civil remedy . . . to all people where, *under color of State law,* they . . . may be deprived of rights to which they are entitled under the Constitution. . . ." 98 S.Ct. at 2032 (emphasis added). To this effect, Senator Edmunds stated that "[It defines] the rights secured by the Constitution . . . when they are assailed by *any State law* or under color of any State law. . . ." 98 S.Ct. at 2033 (emphasis added).

also relied heavily on its conclusion that Section 2 of the Dictionary Act, Act of February 25, 1871, ch. 71, § 2, 16 Stat. 431, passed only months before the Civil Rights Act, provided a definition of the word "person" used to describe the class of defendants in Section 1983 suits. It reads in pertinent part:

> "in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in more limited sense."

TRPA is a body politic and corporate and therefore a person under Section 1983. It is a separate legal entity and a political subdivision of the states under the Compact. It would be no less a body politic and corporate if it were otherwise an arm of the states for Eleventh Amendment purposes. The phrase "bodies politic and corporate" includes even the states themselves. See, e.g., *United States v. Maurice*, 2 Brock 96, 109 (C.C. Va. 1823) (Marshall C.J.) ("The United States is a government and, consequently, a body politic and corporate."). See also *Pfizer, Inc. v. Government of India*, — U.S. —, 98 S.Ct. 584, 589, n. 15 (1978) (A foreign nation is a "person" within the meaning of § 4 of the Clayton Act).

It is now established, moreover, that the Eleventh Amendment is no bar to a suit authorized by Congress in the exercise of its enforcement powers under Section 5 of the Fourteenth Amendment. In *Fitzpatrick v. Bitzer*, 427 U.S. 457 (1976), this Court upheld Congress' authority, in the exercise of those enforcement powers, to require states to submit to private suits from which they would otherwise be immune under the Eleventh Amendment. The Court in that case held that an action could be maintained against the Connecticut State Retirement Fund under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42

U.S.C.A. § 2000e *et seq.* (1970 ed. and Supp. IV). The Court recently affirmed the principle of *Fitzpatrick v. Bitzer* in *Hutto v. Finney, supra*, upholding an award of attorneys' fees to be paid out of the funds of the Alabama Department of Corrections. The decision was based in part on Congressional authorization of such awards against the states in the Civil Rights Attorney's Fees Award Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (1976), codified in 42 U.S.C. § 1988, enacted under Section 5 of the Fourteenth Amendment.

Section 1983 was also enacted pursuant to Congress' enforcement powers under Section 5 of the Fourteenth Amendment.[22] Furthermore, the legislative history of Section 1983 shows that Congress intended Section 1983 to be interpreted as broadly as possible. Representative Perry stated that Congress in enacting Section 1983 had "asserted as fully as we can assert the constitutional rights of Congress to legislate." See *Monell, supra*, 98 S.Ct. at 2033, n. 45, and p. 27, above. Accordingly, it is neither necessary nor reasonable to construe the Eleventh Amendment as a limitation on the definition of "person" under Section 1983 or the scope of suits permitted under it.[23]

It has been shown above that TRPA does not have Eleventh Amendment immunity. It follows from *Monell, Fitzpatrick* and *Hutto*, however, that even if the Eleventh

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22. The very title of the Act, "An Act to enforce the provisions of the Fourteenth Amendment and for other purposes," lays to rest any doubt about the power being exercised by Congress in enacting it.

23. The per curiam decision in *Alabama v. Pugh*, — U.S. —, 98 S.Ct. 3057 (July 3, 1978), upheld the Eleventh Amendment as a defense in a prisoner suit which was brought under Section 1983. However, as Justice Stevens observed in his dissenting opinion, the Court surely did not intend to resolve this issue summarily in this decision. See 98 S.Ct. at 3059 n.

Amendment otherwise did apply to TRPA, it would provide no defense to petitioners' Section 1983 claims.

The Court of Appeals here ruled that although petitioners stated a claim for deprivation of their rights under the Fifth and Fourteenth Amendments, they nevertheless had no claim under Section 1983 because the deprivation was not "under color of state law." It reasoned that "[w]hile TRPA exercises the power of the constituent states, it does so pursuant to federal law" since the compact is a federal law for jurisdictional purposes. [A.P. 15, n. 20; 566 F.2d at 1363 and n. 20] It maintained that this was "not inconsistent with [its] earlier finding of state *action* to support a cause of action under the Fourteenth Amendment." *Id.*

In fact, these rulings are entirely inconsistent. It makes no sense to say that TRPA's action is "state action" under the Fourteenth Amendment but not "under color of any law, statute, ordinance, regulation, custom, or usage of any State" under Section 1983. The two "have consistently been treated as the same thing." *United States v. Price,* 383 U.S. 787, 794, n.7 (1966). The very purpose of Section 1983 is to enforce the Fourteenth Amendment. Furthermore, although the Compact is federal law for purposes of federal court jurisdiction, it does not follow that it is not also state law. TRPA's authority results not only from Congress' consent to the Compact, but also from enactment of the Compact by both California and Nevada. The Compact is on the statute books of both states, and either state can repeal TRPA's authority within its jurisdiction, in spite of Congress' consent, by withdrawing from it. [Compact, Art. VIII(c), A.P. 79] To say that TRPA does not act under color of the states' authority, as well as that of Congress, is entirely unrealistic, as the Court of Appeals

itself recognized in finding that TRPA was subject to the Fourteenth Amendment.[24]

* * *

In summary, TRPA is not entitled to Eleventh Amendment immunity in the first place, based on an analysis of its powers and functions and its relationship with the compacting states. In addition, under the Compact, California and Nevada waived any immunity TRPA might have had. Finally, even if TRPA's immunity had not been waived generally, it still would provide no defense to petitioners' claims under Section 1983, which was enacted under Congress' authority to enforce the Fourteenth Amendment.

II. THE MEMBERS OF THE TAHOE REGIONAL PLANNING AGENCY'S GOVERNING BODY ARE ENTITLED TO ONLY A QUALIFIED IMMUNITY FROM ACTIONS FOR DAMAGES BASED ON THEIR UNCONSTITUTIONAL ACTS.

The Court of Appeals ruled below that the members of TRPA's governing body are absolutely immune from suits to the extent their challenged acts were performed in a "legislative" capacity.[25] It characterized TRPA as a "re-

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24. In thus finding that congressional consent has precluded application of § 1983 to TRPA, the Court of Appeals again wholly disregarded Section 5 of the Act granting consent which provides that "[n]othing contained in this Act . . . shall in any way affect . . . the applicability of any law or regulation of the United States. . . ." Section 1983 is such a law. In addition, there have been other cases in this Court in which regulations of a state that required federal approval have nevertheless apparently been the basis of a § 1983 action. *Rosado v. Wyman,* 397 U.S. 397 (1970); *King v. Smith,* 392 U.S. 309 (1968); see Note, Federal Judicial Review of State Welfare Practices, 67 Colum. L. Rev. 84 (1967). That should be true here as well. But if the Court of Appeals is correct and TRPA does not act under color of state law at all, that certainly is an additional factor tending to show that TRPA is not an arm or alter ego of the states entitled to their Eleventh Amendment immunity. See pp. 18-22, above.

25. The Court of Appeals agreed th[illegible] TRPA's members are entitled to only a qualified immunity to the extent they were acting in an "executive" capacity. [A.P. 19, 566 F.2d at 1365]

gional legislature," and referring to this Court's decisions granting members of Congress and state legislatures absolute immunity, *Doe v. McMillan,* 412 U.S. 306 (1973); *Tenney v. Brandhove,* 341 U.S. 367 (1951), it "discern[ed] no reason why those 'regional legislators' should not be accorded the same immunity as their state and national counterparts." [A.P. 18-19, 566 F.2d at 1365]

The Court of Appeals' extension of absolute immunity to the members of such an administrative body as TRPA is unprecedented in the decisions of this Court. While this Court has found absolute immunity appropriate for state and federal legislators, *Doe v. McMillan, supra; Tenney v. Brandhove, supra;* and for judicial officers and federal officials acting in judicial roles, *Butz v. Economou,* — U.S. —, 98 S.Ct. 2894, 2912-16 (June 29, 1978); *Stump v. Sparkman,* — U.S. —, 98 S.Ct. 1099 (March 28, 1978); *Imbler v. Pachtman,* 424 U.S. 409 (1976); *Pierson v. Ray,* 386 U.S. 547 (1967); it has refused it to a state's highest executive officer, *Scheuer v. Rhodes,* 416 U.S. 232 (1974). It has never extended absolute immunity to officials of subordinate state agencies or political subdivisions such as TRPA, limiting such officials to a qualified immunity. *Procunier v. Navarette,* — U.S. —, 98 S.Ct. 855 (February 22, 1978); *O'Connor v. Donaldson,* 422 U.S. 563 (1975).[26]

This Court's recent decision in *Butz v. Economou* again made it clear that absolute immunity is an exception with very limited application. As the Court put it, "federal officials who seek absolute exemption from personal liability

26. Although most of these decisions dealt with the form of official immunity available in actions under 42 U.S.C. § 1983, while this is in part a *Bivens* action, the Court of Appeals correctly ruled that the immunities in both sorts of actions are identical. [A.P. 16-17, 566 F.2d at 1364.] This Court agreed with that proposition in *Butz v. Economou, supra,* 98 S.Ct. at 2907-10.

for unconstitutional acts must bear the burden of showing that public policy requires an exemption of that scope." This complete protection is confined "to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." 98 S.Ct. at 2911.

Notably, in *Wood v. Strickland,* 420 U.S. 308 (1975), this Court denied absolute immunity to the members of an elected local school board. Although acknowledging that "school board members function at different times in the nature of legislators and adjudicators" (420 U.S. at 319), it permitted them only a qualified immunity in administering discipline to a student, where presumably they acted in their judicial role. TRPA's members functioning "legislatively" have no greater claim to absolute immunity than school board members functioning "judicially." Both should be entitled only to the same qualified immunity which this Court carefully defined in *Wood.*

The Ninth Circuit's extension of absolute immunity to TRPA's members is also in conflict with decisions of the First, Fifth, Sixth, Seventh, and Eighth Circuits, which have denied absolute immunity to subordinate "legislative" bodies. *Williams v. Anderson,* 562 F.2d 1081, 1101 (8th Cir. 1977) (school board members); *Jones v. Diamond,* 519 F.2d 1090, 1101 (5th Cir. 1975) (county supervisors); *Curry v. Gillette,* 461 F.2d 1003, 1005 (6th Cir.), *cert. denied,* 409 U.S. 1042 (1972) (aldermen); *Progress Development Co. v. Mitchell,* 286 F.2d 222, 231 (7th Cir. 1961) (members of park district board and village board of trustees); *Nelson v. Knox,* 256 F.2d 312, 314-15 (6th Cir. 1958) (city commissioners); *Cobb v. City of Malden,* 202 F.2d 701, 706-07 (1st Cir. 1953) (McGruder, C.J., concurring) (city councilmen).

Justice Stewart, then on the Sixth Circuit, stated the rule twenty years ago in *Nelson v. Knox, supra,* when he said:

> "In the light of the relevant federal decisions, we cannot agree that members of a municipal legislative body share the complete immunity from liability which is enjoyed by judges and state legislators. . . .
>
> "It is our opinion that the defendants in this case were not clothed with complete immunity but enjoyed instead a qualified privilege." 256 F.2d at 314-15.

Nearly one hundred years ago this Court recognized that the absolute legislative immunity given Congress is not, as the Court of Appeals assumed, an attribute of every "legislative" body but an exceptional privilege given to Congress by the Constitution because of its special position as an independent department of the national government. In *Kilbourn v. Thompson,* 103 U.S. 168 (1881), a witness who had refused to answer questions put to him by the House of Representatives was imprisoned for contempt by order of the House. He brought an action for false imprisonment against the sergeant-at-arms of the House and several members. After finding that the House did not have the power to jail the witness, the Court considered the defense of immunity raised by the representatives who had introduced and voted on the resolution directing his arrest. The Court stated:

> "If they had done this in any ordinary tribunal, without probable cause, they would have been liable for the action which they had thus promoted.
>
> "The House of Representatives is not an ordinary tribunal. The defendants set up the protection of the Constitution, under which they do business as part of the Congress of the United States. That Constitution declares that . . . 'for any Speech or Debate in either House, they shall not be questioned in any other place.'" 103 U.S. at 201.

Reading the speech and debate clause as broadly protecting all forms of Congress' "legislative" activity, the Court held the representatives absolutely immune from Kilbourn's action. It saw the speech and debate clause as only one of a number of parliamentary privileges conferred on Congress by the Constitution that, taken as a whole, were designed to preserve Congress' special status as a coordinate branch of the federal government. 103 U.S. at 201-202, 190, 192.

Later decisions of this Court have confirmed that the roots of absolute legislative immunity are found in the Constitutional mandate of the speech and debate clause and comparable provisions contained in the constitutions of virtually every state. *Tenney v. Brandhove, supra,* 341 U.S. at 372-375; see *Imbler v. Pachtman, supra,* 424 U.S. at 434-35, n. 1 (White, J., concurring). They have also reiterated that its function is to preserve the independence of these bodies from the other departments and to insure the separation of powers ordained by the Constitution by preventing domination of the co-equal legislative branch by the executive and judiciary branches through intimidation of individual legislators. *Doe v. McMillan, supra,* 412 U.S. at 311 (1973); *Gravel v. United States,* 408 U.S. 606, 616, 617 (1972); *United States v. Brewster,* 408 U.S. 501, 508 (1972); *United States v. Johnson,* 383 U.S. 169, 178-179 (1966). It is thus not the policymaking function of Congress and state legislatures that gives their members absolute immunity, but their positions of special dignity as the highest such bodies in the constitutional scheme.

Moreover, as the Court observed in *Kilbourn,* this absolute immunity does not stand alone. It is part of a package of other parliamentary privileges that also serve to buttress the separation of powers. Other parts of this package and

other attributes of Congress and state legislatures counterbalance the danger that the absolute privilege will be abused by operating to deter arbitrary and malicious action by legislative officials and to remedy it when it occurs. The power to punish or expel members for misconduct is one of these other attributes.[27] From the earliest days, it has been relied on by the courts as an alternative to judicial scrutiny of legislator's actions and a justification for absolute legislative immunity. *Coffin v. Coffin*, 4 Mass. 1, 28 (1808). In addition, and most importantly, the conduct of the members of these bodies is regularly subject to scrutiny by the people in periodic elections. These checks, not judicial review, are the ones the Constitution's framers relied on to prevent abusive action. Accordingly, the Court in *Tenney v. Brandhove* rejected judicial intervention in the affairs of state legislatures and held that "[s]elf-discipline and the voters must be the ultimate reliance for discouraging or correcting . . . abuses." 341 U.S. at 328.

The considerations that justify absolute immunity for members of Congress and state legislatures do not support it for the members of TRPA's governing body. TRPA and other subordinate bodies do not come within the speech and debate clause. TRPA, in fact, lacks virtually every element of parliamentary privilege with which the protection

27. U.S. Const. art. I, § 5, cl. 2; Cal. Const. art. IV, § 5; Nev. Const. art. 4, § 6. Examples of other elements of parliamentary privilege include the power to judge the election and qualifications of members, U.S. Const. art. I, § 5, cl. 1; Cal. Const. art. IV, § 5; Nev. Const. art. 4, § 6; the power to compel attendance of absent members, U.S. Const. art. I, § 5, cl. 1; Cal. Const. Art. IV, § 7(a); Nev. Const. art. 4, § 13; and privilege from arrest during sessions, U.S. Const. art. I, § 6, cl. 1; Cal. Const. art. IV, § 14; Nev. Const. art. 4, § 11. TRPA lacks these attributes. Its members are also not subject to the usual restrictions forbidding legislators from holding other offices, *e.g.*, U.S. Const. art. I, § 6, cl. 2; Cal. Const. art IV, § 13; Nev. Const. art. 4, § 8.

of the speech and debate clause is associated and that generally characterize Congress and state legislatures. Nothing in the Constitution requires the separation of powers principle to be observed in a subordinate level of government like TRPA.

In fact, TRPA's governing body's only resemblance to Congress or a state legislature is that it makes rules, and even that resemblance is superficial. Unlike a legislature, TRPA also has "executive" enforcement powers [Compact Art VI(b), A.P. 75] and even its rulemaking authority is restricted to resource conservation and developmental planning and is further circumscribed by the basic policies laid down by the Compact. See *State ex rel. List v. County of Douglas*, 90 Nev. 272, 524 P.2d 1271, 1277 (1974); *People ex rel. Younger v. County of El Dorado*, 5 Cal.3d 480, 487 P.2d 1193, 1210, 96 Cal.Rptr. 553 (1971).

TRPA's case for absolute immunity is no stronger than that of city councils and county boards of supervisors, which have been given only qualified immunity in the decisions of other Circuits, and the school board that was given only a qualified immunity by this Court in *Wood, supra*. See pp. 33-34, above. Like them, it is made up chiefly of local officials, is financed by local government, and exercises its limited powers in a localized area. If TRPA is a "regional legislature", then these boards and councils are "local legislatures" entitled to the same absolute protection. But TRPA's case for absolute immunity is actually weaker than theirs. Their members are at least elected, while TRPA's are only appointed and thus are not subject to scrutiny by the voters as an "ultimate reliance for discouraging or correcting . . . abuses."

TRPA's governing body is, in short, no more than an appointed administrative body, like many thousands of other administrative bodies at all levels of government. Extension of absolute immunity to its members is an in-

vitation to these subordinate officials to trample individual rights with impunity, secure in the knowledge that the citizens whose rights they invade have no remedy. Neither precedent nor policy justifies an extension of this extraordinary protection to the members of TRPA's governing body. Like the school board members in *Wood v. Strickland,* they should be governed by the general rule of qualified immunity this Court carefully defined in that case. The Court of Appeals' decision should be reversed.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the judgment of the court below should be reversed as to those issues and the case remanded for further proceedings in the District Court.

Dated: August 19, 1978.

Respectfully submitted,

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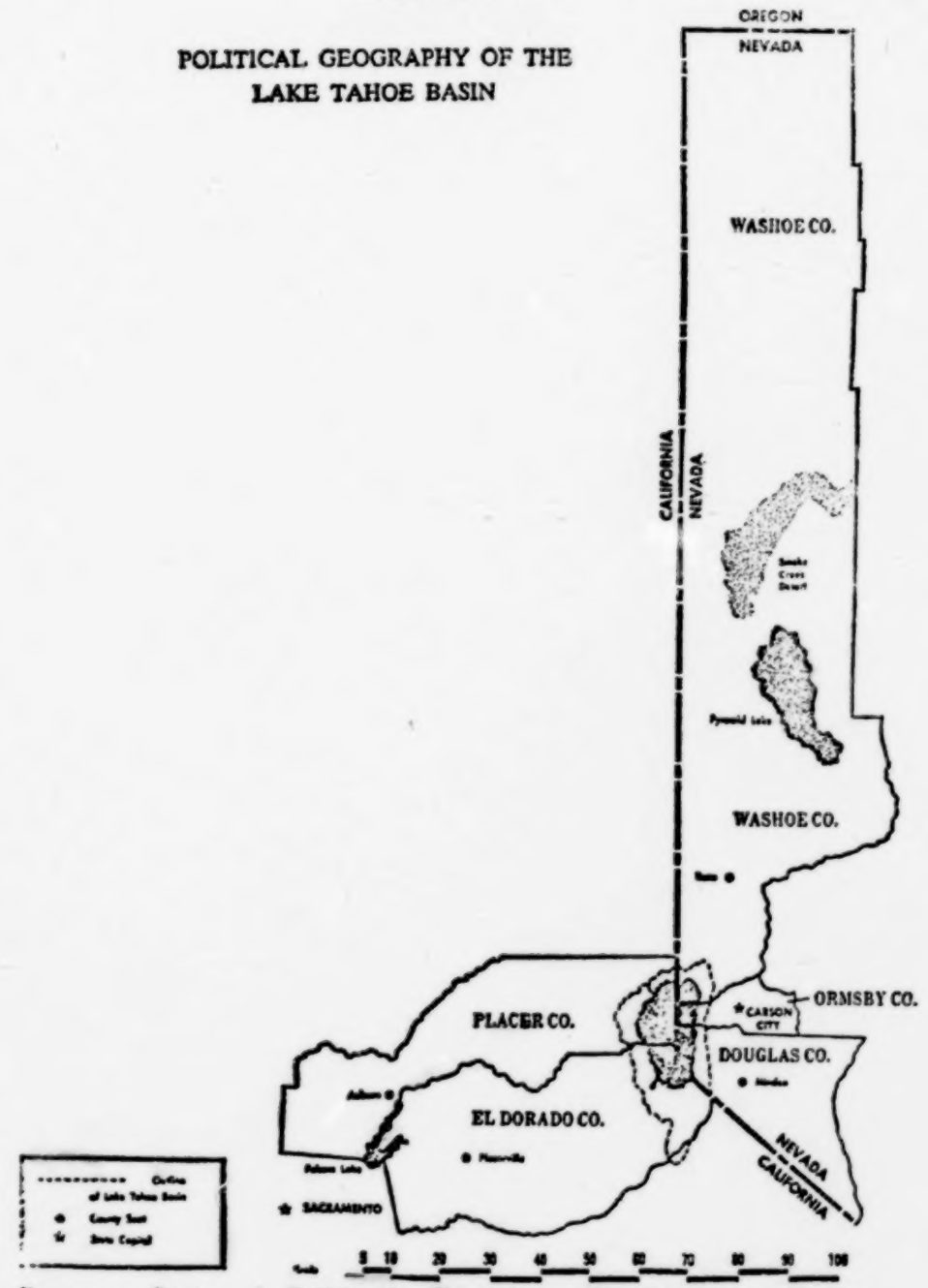
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(Appendix follows)

Appendix A

POLITICAL GEOGRAPHY OF THE LAKE TAHOE BASIN



SOURCE: State of California Report to the Secretary of the Interior, Protection of the Lake Tahoe Environment, reprinted in S. Rep. No. 91-510, 91st Cong., 1st Sess., 17.

Supreme Court, U. S.
FILED
SEP 20 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

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Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Respondents.

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BRIEF FOR RESPONDENT STATE OF NEVADA

QUESTIONS PRESENTED

I. IS TRPA AN AGENCY OF CALIFORNIA AND NEVADA OR IS IT A POLITICAL SUBDIVSION OF BOTH STATES?

II. DID CALIFORNIA AND NEVADA WAIVE THEIR ELEVENTH AMENDMENT IMMUNITY BY JOINING THE TAHOE REGIONAL PLANNING COMPACT?

STATEMENT OF THE CASE

Nevada adopts and incorporates the Statement of the Case set forth in Tahoe Regional Planning Agency's brief on the petition.

Nevada was named as a defendant in the Lake County Estates' complaint but was never served with process. Nevada was a defendant and served in the Jacobsen and Layton-Tahoe complaints, which were consolidated with Lake County and a fourth case (Jones) before the Court of Appeals. The consolidated opinion of the Court of Appeals (Petition, Appendix A) affirmed the District Judges' dismissals of Nevada from Jacobsen and Layton-Tahoe.

Neither Jacobsen or Layton-Tahoe petitioned this Court for review. Nonetheless, Nevada is vitally concerned with this Court's decision on the writ granted herein as to whether the TRPA is a political subdivision or an agency of the State of Nevada. Nevada does not agree with Petitioners' statement (fn. 3, page 4, Brief for Petitioner) that only TRPA and the individual

respondents are adverse to the petitioners. Nevada submits that she is adverse to the petitioners insofar as a waiver of her Eleventh Amendment immunity is drawn into question.[1]

ARGUMENT

I. The Tahoe Regional Planning Agency Is a Political Subdivision of the State and Is Not a Department or Agency of The Executive Branch of State Government.

The question of whether the Tahoe Regional Planning Agency (TRPA) had Eleventh Amendment immunity should be addressed first since if the Court should conclude that TRPA has none it will not be necessary to reach the question of waiver. Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, at 280.

1/ Nevada did not file a brief in opposition to the Petition for Certiorari, as it did not seek review of the Court of Appeal's holding that an action for inverse condemnation would not lie against TRPA. Neither did Nevada view the petition as entirely without merit since Nevada is in agreement with Petitioners that the TRPA is not an agency of the State but a political subdivision. Consequently, Nevada did not file a statement with the Clerk waiving the right to oppose the petition.

Article III(a) of the Tahoe Regional Planning Compact, 83 Stat. 360, states that the Tahoe Regional Planning Agency is created as a "separate legal entity". The only meaning which can be ascribed to the words "separate legal entity" is that the Congress and the California and Nevada Legislatures intended that the TRPA be a legal entity apart and distinct from, and in no way connected with, the Federal government, either State government or county or local governments. Indeed, the only control which either State can exercise over the TRPA is to withdraw from the Compact (Art. VIII(c)) or through its amendment by the States and Congress.

The Eighth Circuit Court of Appeals held in Petty v. Tennessee-Missouri Bridge Comm., 254 F.2d 857, 859, reversed on other grounds, 359 U.S. 275 (1959), that the bistate bridge commission was not a "separate entity" apart from the two states, but instead held it was an agency of the two states in view of the nature and limited powers of the commission. The Court viewed as determinative of the question the fact that (1) the two governors made all appointments; (2) the governors could veto all actions taken by the commission; (3) the commission's bonds were exempted from both states' taxation statutes; and (4) title to the bridge facility would vest in the two states when the bonds were paid.

Significantly, the State of Nevada has no authority or control whatsoever over the TRPA, its policies, its deliberations, or its actions. Such lack of direction and control is in marked

contrast with departments, boards and commissions of the Executive Branch of State Government over which the Governor has the direction and control thereof and the State has the ultimate responsibility for their budgets, policies, programs and actions.

Although the Legislatures gave the TRPA the status of a "separate legal entity", they did not, except zoning, vest in TRPA any of the other powers generally characteristic of a political subdivision of a state such as the power to tax, to elect officials, or the power of eminent domain. Richmond County Hosp. Auth. v. McClain, 144 S.E.2d 565, 566. Since the TRPA was not given those powers normally attributable to political subdivisions, one might have urged with some justification that the TRPA was not a political subdivision after all, but merely an agency of the states. To remove any doubt of whether TRPA is an agency of the states, or to preclude any such construction by the Courts, the Legislatures specifically provided that for the purposes of suit, the TRPA would be deemed a political subdivision.

The zoning power traditionally has been delegated to and exercised by local government subdivisions as matters embracing local community concerns, Warth v. Seldin, 422 U.S. 490, 508, n.18. Since neither of the three Nevada counties could implement zoning controls outside the county, the TRPA was conceived to cut across the county lines and exercise zoning controls throughout the lake basin. Even then, each county is still permitted (Art. VI(a) to enact zoning ordinances which enforce equal or higher land use standards than those prescribed by TRPA ordinances.

Article VI(b) of the Compact does provide that for purposes of enforcing TRPA ordinances. "[T]he agency shall be deemed a political subdivision of both the State of California and the State of Nevada." (Emphasis added) It is also worthwhile to note that agency is not a political subdivision of each state but partakes of the sovereignty of "both" states. It is one separate political subdivision of both states.

The California Supreme Court, in People ex rel. Younger v. County of Eldorado, 96 Cal.Rptr. 553, 487 P.2d 1193 observed that the TRPA was on an equal legal footing with local political subdivisions such as general improvement districts.

The fact that the TRPA was conceived in part by an act of the Nevada Legislature does not make it any more an agency of the State than it is an agency of California or an agency of the United States because of the acts of the California Legislature and the Congress approving the Compact. The counties and incorporated cities within Nevada are not agencies of the state merely because they are created or receive their charters by acts of the Legislature, otherwise, no political subdivision could ever be created. As further evidence that the states and the Congress did not view the TRPA as a state agency is found in Article VII(f) of the Compact "that no obligation contracted by the agency shall bind either of the party states ..."

The petitioners have ably discussed (Pet. Brief pp. 15-18) the decisions of this Court and others which looked to the characteristics and powers of a governmental unit and how its functions related

to the State. Nothing will be gained here by further discussion. In addition, Nevada is in agreement with Petitioners' argument (Pet. Brief p. 18-22) that the TRPA is a political subdivision of both states and not an agency of either.

II. NEVADA HAS NOT WAIVED HER ELEVENTH AMENDMENT IMMUNITY BY JOINING THE TAHOE REGIONAL PLANNING COMPACT.

A. The Court of Appeals held It Was the State's Immunity Which Was Not Waived.

Assuming arguendo that TRPA is an agency within the executive branch, Nevada submits that the compact did not waive her Eleventh Amendment immunity.

Petitioners characterize the question of waiver (Question Presented III, and Arguments IA and IC) solely of the TRPA losing its Eleventh Amendment immunity. Petitioners' characterization of the waiver does not accord with the Court of Appeals holding. The Court of Appeals concluded (Pet. for Cert., App. A, p. 8):

> "*** [T]he TRPA is immune from suit under the Eleventh Amendment so long as the states have not waived their immunity as to suit against the entity which they created." (Emphasis added)

This is a clear holding that the immunity, if it is to be waived, is the immunity of the states and not the immunity of an agency of either state. Since a state can only act through officers and agents, an agency of the state and the state are indistinguishable. It follows

that it is the immunity of the State which attaches to her agencies and instrumentalities.

B. Waiver by a State Of Her Eleventh Amendment Protection Will Be Held Only In The Most Clear Circumstances.

The decisions of this Court are clear on this point - a waiver of a state's Eleventh Amendment protection will be found in only the most clear and explicit circumstances.

> "*** Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.' Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909). We see no reason to retreat from the Court's statement in Great Northern Insurance Co. v. Read, 322 U.S. 47, 54." Edelman v. Jordan, 415 U.S. 651, at 673.

In Great Northern Ins. Co. v. Read, the Court said (322 U.S. at 54):

> "...when we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found."

This Court has found a waiver of a state's Eleventh Amendment protection in two cases when a state had entered into an area or conducted activity which were subject to regulation by Congress.

In Petty v. Tennessee-Missouri Bridge Commission, supra, the two states built and maintained a bridge over and in navigable waters which were under the exclusive regulatory power of the Congress. Suit was brought under the Jones Act for a seaman's (ferryboat hand's) death. The interstate compact authorized the commission to "sue and be sued" and also expressly reserved undiminished the full right and power of the federal courts regarding navigable waters and rivers. Since the bridge commission had been held to be an instrumentality of both states the "sue and be sued" clause was actually consent by the states to a suit against them. This Court read the reservation of judicial power together with the sue and be sued clause as rendering the two states amenable to suit in Federal Court under Congress' plenary power to regulate commerce on navigable waters under the Jones Act.

The Tahoe Regional Planning Agency Compact does not contain a similar provision reserving jurisdiction of the federal courts. It is submitted that

such a provision was not necessary because nowhere does the United States Constitution vest in the Congress any power to regulate the use of land under zoning criteria. It is further submitted that the rights of plaintiffs alleged to be violated do not arise under any federal law implementing Congress' plenary power over commerce such as FELA or the Jones Act.

In Parden v. Terminal Railway of Alabama, 377 U.S. 184 (1964), the state owned and operated a railroad in interstate commerce. Alabama argued it was immune from suit under the Federal Employers' Liability Act by reason of the Eleventh Amendment. This Court disagreed, saying that the plenary power to regulate interstate commerce gave Congress power to subject the state, as a common carrier, to the federal act; and that when the state chose to operate a railroad in interstate commerce it necessarily consented to suit authorized by the FELA.

In the present case, the State of Nevada has not entered into any sphere of activity which the Constitution gives Congress exclusive regulatory power. On the contrary, the zoning of use of property is not ordinarily a matter for Congressional concern, but is of local concern, Warth v. Seldin, supra, p. 5. The power of zoning historically has been delegated to local government subdivisions by the states. Thus, Nevada and California have not left an area reserved to them by the Tenth Amendment, i.e., local zoning.

Petitioners place much reliance on Art. VI(b) (Pet. Brief, p. 24) by

reading into it far more than the provision literally provides.

> "All ordinances, rules, regulations and policies adopted by the agency shall be enforced by the agency and by the respective states, counties and cities. The appropriate courts of the respective states, each within its limits of territory and subject matter provided by state law, are vested with jurisdiction over civil actions to which the agency is a party and criminal actions for violations of its ordinances. Each such action shall be brought in a court of the state where the violation is committed or where the property affected by a civil action is situated unless the action is brought in a federal court. For this purpose, the agency shall be deemed a political subdivision of both the State of California and the State of Nevada."

What is the purpose of VI(b)? It places a duty upon the states, TRPA and local government to enforce the Agency's ordinances, and regulations, and vests state and federal courts with enforcement jurisdiction. It is civil and criminal actions brought by the states, TRPA or local governments to enforce agency ordinances to which VI(b) is directed - not actions by private citizens against the agency. Certainly Lake County's complaint in inverse condemnation is not an action to enforce the land use ordinance Nor can Lake County's complaint for

injunctive relief be viewed as an action to enforce the very land use ordinance which is attacked.

Furthermore, there is a heavy burden on the petitioners to show an "intentional relinquishment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938) and Fay v. Noia, 372 U.S. 391 (1963). It is submitted that the petitioners have not met their heavy burden in this case.

CONCLUSION

For the reasons stated in Argument I, it is respectfully submitted that the holding of the Court below that the TRPA is an agency of the States of California and Nevada should be reversed and the case remanded for further proceedings. For reasons stated in Argument II, the holding of the Court below that the party states did not waive their immunity should be sustained.

Dated: September 20, 1978.

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Supreme Court, U. S.
FILED
OCT 5 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Brief of Respondent State of California

OPINIONS BELOW

The opinions of the lower courts are adequately referenced in the brief for the petitioners.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Brief for the Petitioners.

QUESTIONS PRESENTED

1. Does the Tahoe Regional Planning Compact, which creates the Tahoe Regional Planning Agency (hereafter TRPA) and which defines that agency as a separate legal entity and political subdivision of California and Nevada

and provides for funding from the counties in the Lake Tahoe Basin and provides for less than a majority of the members to be appointed by the respective states and which does not give either state veto authority over the actions of the agency, accord to the TRPA the status of being the alter-ego of the two compacting states, thereby entitled to the protection of the Eleventh Amendment?

2. Even if the TRPA is an Eleventh Amendment agency, does the Tahoe Regional Planning Compact waive the Eleventh Amendment when that compact does not in any reasonable manner indicate that the states or Congress intended a waiver and when the one reference to federal courts (article VI(b)) has several reasonable meanings which do not result in a waiver?

STATUTES INVOLVED

The Brief for the Petitioners adequately references the pertinent statutes.

STATEMENT OF THE CASE

TRPA was created following Congressional ratification of the proposed Tahoe Regional Planning Compact between the states of California and Nevada. Public Law 91-148, 83 Stat. 360; California Government Code section 66801. The compact invested the TRPA with jurisdiction over the watershed of the Lake Tahoe Basin, portions of which are located in both states. Article II(a). To paraphrase the California Supreme Court, the basic concept of the compact is to provide for the planning, conservation and resource development of the region in order to accommodate a growing population within a relatively small area without destroying the environment. *People ex rel Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 487.

Pursuant to article V(b) the TRPA adopted a Plan and pursuant to article VI(a) it also adopted an implementing Land Use Ordinance. The adoption of these measures is alleged in petitioners' first amended complaint. Appendix at pp. 9 and 13. Petitioners' complaint, while setting forth many claims, generally alleges that the actions of defendants have taken petitioners' property without due process of law and without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

Petitioners filed the instant litigation on April 16, 1973, in the United States District Court for the Eastern District of California against TRPA, El Dorado County, the states of California and Nevada, the then members of TRPA's Governing Body and the then executive officer of the TRPA. Appendix at p. 1. The proceedings in the lower courts are accurately set forth in "Disposition Below" at p. 7 of Brief of Certain Respondents in Opposition to Petition.

As noted above, California was a named party in this action but California has never been served. However, the state was named and served in two of the other cases which were included in the consolidated opinion of the 9th Circuit Court of Appeals. Those two cases are *Jones v. Tahoe Regional Planning Agency* (United States Court of Appeals for the 9th Circuit No. 76-1182) and *Layton-Tahoe Properties v. Tahoe Regional Planning Agency* (United States Court of Appeals for the 9th Circuit No. 76-1608).

The portions of the compact relevant to the state's argument are discussed in detail in the body of this brief.

SUMMARY OF ARGUMENT

A close review of the pertinent provisions of the Tahoe Regional Planning Compact makes it clear that the TRPA is not a creature of the state and is not entitled to the

protection of the Eleventh Amendment. Additionally, the lack of state control over the TRPA thoroughly distinguishes the cases where virtual plenary state control of compact agencies resulted in holdings according those agencies Eleventh Amendment status. *Petty v. Tennessee-Missouri Bridge Comm'n.* (8th Cir. 1958) 254 F.2d 857, reversed on other grounds in *Petty v. Tennessee-Missouri Bridge Comm'n.* (1959) 359 U.S. 275 and *Trotman v. Palisades Interstate Park Comm'n.* (2d Cir. 1977) 557 F.2d 35.

Even if the TRPA is properly accorded Eleventh Amendment status, there is no reasonable indication in the Tahoe Regional Planning Compact that the states waived the Eleventh Amendment. The passing reference in article VI (b) to actions in federal court is not analogous to the sue and be sued clause involved in the compact before this court in *Petty v. Tennessee-Missouri Bridge Comm'n.* (1959) 359 U.S. 275 (wherein a waiver was found). Moreover, the thrust of article VI(b) is to confer state court jurisdiction over actions to which TRPA is a party and to place venue for the same. The reference to federal court actions is merely an acknowledgement of certain limited circumstances where TRPA may be a party in federal litigation (as where TRPA makes a general appearance thus waiving any Eleventh Amendment immunity). Applying the test that a waiver must be express or implied by such overwhelming implication as will leave room for no other reasonable construction, there is no waiver in the Tahoe Regional Planning Compact. *Edelman v. Jordan* (1973) 415 U.S. 651, 673.

ARGUMENT

I. THE TAHOE REGIONAL PLANNING AGENCY IS NOT AN ARM OF THE STATE ENTITLED TO ELEVENTH AMENDMENT IMMUNITY.

A. It Is Clear from the Compact That the Tahoe Regional Planning Agency Is Not a Part of the State.

Below we shall point to various provisions of the compact which make it clear that the TRPA is not an arm of the State of California.

Article III(a), in the context of setting forth the agency's organization, defines the TRPA as a "separate legal entity". This is not language which operates to create state agencies.

Article VI(a), in the course of establishing the agency's powers, defines the agency as a "political subdivision" of both states for litigation purposes. The creation of a political subdivision is not the creation of an agency of the state. This is clear under California law which excludes a political subdivision from being a part of the state for purposes of liability. California Government Code section 940.4 provides as follows:

> " 'Local public entity' includes a county, city, district, public authority, public agency, and any other *political subdivision* or public corporation in the State, *but does not include the State.*" (emphasis added)[1]

Article III(a) sets up the membership of the Governing Body of TRPA. There are ten members with five from each state. The State of California has two representatives, an appointee of the Governor and a state official (the Administrator of the Resources Agency). The other three members of the California delegation are selected by Placer and El

1. The state is defined in California Government Code § 940.6 as including any officer or agency, etc., claims against which are paid by the State Controller.

Dorado Counties and the City of South Lake Tahoe, all local governmental agencies which are not a part of the state. See California Government Code § 940.4, *supra*. It is immediately apparent that the State of California does not command even a majority of the California delegation. As will be discussed below, this lack of state control is in sharp contrast to the power of a state governor to veto an action taken by a compact agency as in *Petty v. Tennessee-Missouri Bridge Comm'n.* (8th Cir. 1958) 254 F.2d 857.

To place this point in context, the State of California has on occasion been sufficiently dissatisfied with TRPA to bring suit against it. For example, in *People of St. of Cal. ex rel Younger v. Tahoe Reg. P. Ag.* (9th Cir. 1975) 516 F.2d 215, the court construed article III(g) and article VI(k) of the Tahoe Regional Planning Compact to mean that where the delegations of the two states fail to agree on a development proposal, the proposal is approved sixty days following submission. In that case, the California delegation (including the local representatives) had voted 5 to 0 against the projects and the Nevada delegation had voted 3 to 2 in favor of the projects. The net result, of course, was that California lost the litigation. It would be paradoxical in the extreme to accord TRPA the status of being an arm of the state when the state simply cannot control the actions or inactions of the agency.

Continuing our review of compact provisions, article VII(f) provides as follows:

> "The agency shall not obligate itself beyond the monies due under this article for its support from the several counties for the current fiscal year, plus any monies on hand or irrevocably pledged to its support from other sources. *No obligation contracted by the agency shall bind either of the party states or any political subdivision thereof.*" (emphasis added)

A more clear expression by the states of their intent not to have obligations of the agency imposed as obligations of their respective treasuries is hard to imagine.

Finally, the main body of article VII sets up the funding mechanism for TRPA and provides that the agency may mandate up to $150,000 of funding from the counties in the Lake Tahoe Basin. See generally *People ex rel Younger v. County of El Dorado, supra,* and *State of Nevada ex rel List v. County of Douglas* (1974) 524 P.2d 1271. It is noteworthy that the compact does not anticipate that the states will fund the TRPA in the same manner as they would fund their own agencies such as the Department of Motor Vehicles, etc.[2]

B. The Relevant Cases Indicate That the Tahoe Regional Planning Agency Is Not an Arm of the States.

There are two major opinions from the circuit courts that have set forth the factors which determine the Eleventh Amendment status of compact agencies. One is the 8th Circuit decision in *Petty, supra,* and the other is *Trotman v. Palisades Interstate Park Comm'n.* (2d Cir. 1977) 557 F.2d 35. A close analysis of both cases reveals that the factors employed to determine that the compact agencies created in those cases were arms of the state are not present here.

The relevant discussion in the 8th Circuit decision in *Petty* follows:

> "In our present case, it is apparent that the purpose of the States in entering into the compact and in carrying out the authorized activity was to perform their respective governmental obligations to furnish

2. The states have given money to TRPA to aid it in carrying out its functions. However, nothing in the compact imposes such an obligation.

the public with necessary highways and bridges. The defendant Commission was the agency or instrument of the two States and not an entity separate and apart from the States. The Commission could issue no stock. It was controlled by state officials appointed by the respective governors with senate confirmation. Commission action could be authorized only upon a majority vote of the commissioners from each State. Veto power was reserved to the governors. The Commission's authorized bonds were granted exemption from income taxation. Its revenue from tolls could only be used for reasonable operating expenses and for payment of its bonds and interest, and when the indebtedness was paid the bridge was to belong to the two States and to be operated free of tolls. The Commission afforded no opportunity for realization of private profits to anyone. It had no right to levy taxes. Its tolls were pledged exclusively for operating expenses and bond payments. Aside from the tolls, its only sources of money were the creating States and the Federal Government. It is apparent that a judgment against the Commission and a seizure of the ferry would adversely affect the participating States in the performance of their duty of providing a means of crossing the river." id. pp. 859-60

We will examine this "sentence for sentence" and compare it to the instant case.

The first sentence indicates that the purpose of the compact in *Petty* was to perform governmental obligations to provide public transportation. It is questionable whether this has any bearing on whether a state agency has been created. Regardless, in the instant case there is no governmental obligation to form a compact to deal with the environmental problems at Lake Tahoe. Rather, the decision was made in the discretion of the two states to form a regulatory body in an attempt to deal with those problems.

The second sentence, concluding that the agency in *Petty* was an instrument of the two states, is not an analytical statement but merely a statement of the conclusion. The third sentence regarding the lack of power to issue stock is also the case with TRPA but is seemingly of little relevance.

The fourth sentence regarding control by state officials is important. As we have previously pointed out, California (and Nevada) appoint only two representatives on the TRPA out of a delegation of five members from each state. It is thus clear that TRPA is not state controlled as was the *Petty* agency.

The fifth sentence, dealing with commission action only when a majority vote of the commissioners from each state occurs, is also critical since that factor is missing here. In *People ex rel Younger v. Tahoe Reg. P. Ag., supra,* the court held in effect that where California (or for that matter Nevada) votes against a proposal, it can proceed anyway if supported by the other state's delegation.

The sixth sentence reserving veto powers to the governor is extraordinarily important because, again, this is not the case with the instant compact. Nowhere does the Tahoe Regional Planning Compact reserve such authority to the governors or the legislatures of the respective states.

The seventh sentence is irrelevant to TRPA which has no authority or occasion to issue bonds.

The eighth sentence regarding the use of revenues and the incidence of title in the state is relevant, again, by its absence here. Neither of the compacting states end up as owners of any of the fees or property of the TRPA.

The ninth sentence regarding the realization of profit is not relevant to the TRPA.

The tenth sentence regarding the levy of taxes is relevant since TRPA may levy a "tax" to the extent of $150,000 per year. See, article VII.

The eleventh sentence is merely a statement of the conclusion.

The stark contrast between the *Petty* compact, where the compacting states had virtually plenary control over the agency, and the TRPA, where the compacting states have little control, is apparent.

The reserved state control in the compact involved in the *Trotman* case was at least as plenary as in the *Petty* compact. As with *Petty,* the contrast between the *Trotman* compact and the Tahoe Regional Planning Compact points to the conclusion that the TRPA is not an arm of the compacting states.

Thus, in *Trotman* it was provided that the commission's members were to be appointed by the governors of both states; the agency was deemed to be performing governmental functions of the two states; each state had the power to unilaterally modify the functions and powers of the commission with respect to park lands lying within the particular state; the compact provided that members of the commission and its employees would be considered officers and employees of the state where a tort was committed and that liability would be governed by the laws of the state where the tort was committed. There are no remotely equivalent provisions in the TRPA compact.

The *Trotman* court indicated that the most significant factor in determining whether the Eleventh Amendment is a bar to federal suit is whether liability against the agency must be satisfied from a state treasury. The court's analysis (*Id.* at p. 38) notes that the compact calls for appropriations from the states as a source of revenue. Article VII of the instant compact provides TRPA with funding authority

from the counties in the Lake Tahoe Basin. There is no provision requiring appropriations from the states and in fact the states have disclaimed financial responsibility for the TRPA. Article VII(f).[3]

The Tahoe Regional Planning Compact creates an agency free from the plenary control of the compacting states. This conclusion is evident not only from a review of the compact but by comparison of the compact with the *Petty* and *Trotman* cases. Therefore, in complete contrast to those cases, it is apparent that the TRPA is not an entity of the states and a judgment against TRPA would not be satisfied from the states' treasuries. TRPA may not assert the Eleventh Amendment as a bar to suit in federal courts.

II. IF THE COMPACT ACCORDS THE TAHOE REGIONAL PLANNING AGENCY ELEVENTH AMENDMENT STATUS, THE STATES HAVE NOT WAIVED THEIR ELEVENTH AMENDMENT IMMUNITY.

A. California's Interest.

Petitioners argue that the states have waived the Eleventh Amendment immunity which might otherwise be available to the TRPA. Yet, petitioners also argue that a judgment against TRPA cannot be an obligation of the state treasury. Brief for the Petitioners at p. 20. California has difficulty squaring petitioners' argument with the well-established constitutional rule that Eleventh Amendment immunity is only available where the action is in effect against a state, and where damages are sought, a judgment would ultimately be payable from a state treasury. *Edelman v. Jordan* (1973) 415 U.S. 651, 663; *Trotman v. Palisades Interstate Park*

3. The *Trotman* court observed that whatever fees were collected for use in the New York segment of the park had to be turned over to the New York treasury. There is no such provision in the TRPA compact.

Commission, supra, at p. 38. Thus, while petitioners profess to have no interest adverse to California (see Brief for Petitioners at p. 4 (fn. 3) and p. 7 (fn. 6)), it appears under established concepts that a holding by this court that the compact waives the Eleventh Amendment could leave the state treasury vulnerable should TRPA ever incur monetary liability imposed by federal court judgment.

It is perhaps conceivable that this court could find the compact to have waived the Eleventh Amendment as to the TRPA in a manner that would not operate as a waiver as to the states.[4] This, however, would involve a new constitutional rule seemingly without support from the underlying purpose of the Eleventh Amendment.[5]

It is for these reasons that although petitioners' Eleventh Amendment waiver arguments are not persuasive, California nevertheless is compelled to address them.[6]

B. Assuming the Eleventh Amendment Is Available to the Tahoe Regional Planning Agency, the Tahoe Regional Planning Compact Does Not Waive the Eleventh Amendment.

The law governing determination of Eleventh Amendment waivers has been clearly stated by this court:

> "... We will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *Edelman, supra,* at p. 673.[7]

4. Of course, as we have argued, *supra,* at I, California does not regard the TRPA as an arm of the state which should be accorded any form of Eleventh Amendment status whatsoever.

5. This has been impliedly recognized by TRPA. See Brief of Certain Respondents in Opposition to Petition at p. 20 (fn. 10).

6. The Court of Appeals rejected petitioners' contention in this regard observing it to be "somewhat contrived". *Jacobson v. Tahoe Regional Planning Agcy.* (9th Cir. 1977) 566 F.2d 1353, 1362. We agree.

That this is the governing principle is not in dispute. See Petition for Writ of Certiorari at p. 24 and Brief for the Petitioners at p. 25. The strong showing imposed upon one who would argue that an Eleventh Amendment waiver has occurred is undoubtedly intended to ensure a correct determination, on a case by case basis, of the underlying question of whether a state has intended to waive its immunity. See *Petty v. Tennessee-Missouri Comm'n.* (1958) 359 U.S. 275, 278. We shall show that this test cannot be met.

Petitioners rely on article VI(b). It provides:

> "All ordinances, rules, regulations and policies adopted by the agency shall be enforced by the agency and by the respective states, counties, and cities. The appropriate courts of the respective states, each within its limits of territory and subject matter provided by state law, are vested with jurisdiction over civil actions as to which the agency is a party and criminal actions for violations of its ordinances. Each such action shall be brought in a court of the state where the violation is committed or where the property affected by a civil action is situated, *unless the action is brought in a federal court.* For this purpose, the agency shall be deemed a political subdivision of both the State of California and the State of Nevada." (emphasis added)

The passive reference to the federal courts cannot be considered a waiver of the Eleventh Amendment and consent to federal jurisdiction by the compacting states. Such a waiver has been implied from a sue and be sued clause. *Petty, supra.* But such a clause is a much more direct implication of consent to suit than the indirect federal court

7. See *Great Northern Life Insurance Co. v. Reid* (1944) 322 U.S. 47, 54.

reference in the instant case. Furthermore, while *Petty* found the consent to extend to suits in federal courts, the court in *Trotman* concluded otherwise:

> "Consequently we do not construe the sue-and-be-sued clause to extend the consent of the states to be sued in the state courts, to a waiver of the states' Eleventh Amendment immunity in the federal courts simply because Congress has approved the compact." *Id.* p. 40.

A close analysis of article VI(b) reveals that it is directed toward authorizing and requiring enforcement activities coupled with vesting the courts of the respective states with jurisdiction over actions to which TRPA is a party. Thus, the first sentence of the article mandates that the agency's ordinances, etc., will be enforced by the named entities. The second and third sentences grant jurisdiction to the courts of California and Nevada over actions to which the agency is a party; those two sentences also place venue where the violation was committed or where the property affected is located. Of course, the third sentence contains the reference to federal courts which we shall demonstrate acknowledges limited federal jurisdiction. The fourth and final sentence of the article designates the agency as a political subdivision of both states; we shall show that this acknowledges TRPA's amenability to diversity jurisdiction in federal courts and also makes it clear that TRPA is a public entity of the two compacting states.[8]

---

8. Since article III(a) defines TRPA as merely a "separate legal entity" the last sentence of article VI(b) is significant in according TRPA public entity status such that it is governed by the requirements applicable to public agencies in litigation. For example, under California Code of Civil Procedure section 1058, virtually any public entity of the state or the federal government is exempt from a bond requirement which might otherwise be imposed on a private party.

The clause in the third sentence of article VI(b) referring to a federal court is not a subliminal waiver of the Eleventh Amendment; rather, it serves at least two purposes: The clause is an acknowledgement that in some circumstances an action involving the TRPA may be brought in federal court. For example, the TRPA may commence action in federal court which would operate as a waiver of any Eleventh Amendment immunity by the making of a general appearance. *Clark v. Barnard* (1883) 108 U.S. 436, 447-8; *Petty, supra,* at p. 276. Furthermore, the clause, coupled with the fourth sentence of the article defining TRPA as a political subdivision of both states, acknowledges the possibility of diversity jurisdiction in an action involving TRPA. 42 U.S.C. § 1332. In *Moor v. County of Alameda, supra,* this court held that California counties are sufficiently independent of the state to constitute citizens for purposes of diversity. In so holding, this court relied in part on *People ex rel Younger v. County of El Dorado, supra,* a decision by the California Supreme Court which determined the status of counties for purposes of issuance of a writ of mandate. If a county is not part of the state for diversity purposes, then a separate legal entity and political subdivision (which TRPA is defined to be) is also separate from the state. It would thus appear that TRPA is a "citizen" for diversity purposes.

Since this analysis sets forth the most reasonable and likely meaning of article VI(b), including the clause referring to federal court actions, it is apparent that there is nothing in the article which constitutes an express waiver of Eleventh Amendment immunity or creates such a waiver

by overwhelming implication from the lack of any other reasonable construction.[9]

Petitioners point to section 5 of the compact which was added by Congress. That section does contain a general reservation regarding the applicability of any law or regulation of the United States in the area. This language merely saves the applicability of federal laws or regulations that would otherwise be enforceable. The section makes no mention of federal court jurisdiction, a factor which the *Petty* court considered significant in establishing that a sue and be sued clause had been accepted by the compacting states under circumstances that:

> "make it clear that the States accepting it waived any immunity from suits which they otherwise might have." *Petty, supra,* at p. 280.

No such knowing waiver can be implied here. The reservation in section 5 of the compact before the court adds nothing to petitioners' argument, certainly in the absence of express state consent to be sued via a sue and be sued clause.[10]

In summary, a fair reading of the entire compact reveals no express or implied waiver. The passive reference to federal courts in article VI(b) is not analogous to a sue

9. Of even greater significance in demonstrating the states' express intent not to waive the Eleventh Amendment is article VII(f) (quoted, *supra,* at p. 6). A more clear statement by the compacting states of their intention not to waive Eleventh Amendment immunities would be hard to imagine.

10. Justice Frankfurter's dissent in *Petty* points out that various forms of federal reservations have appeared in numerous compacts. He ascribed little significance to the variation in wording among them. Whether his view is correct or not, the crux of this case is the lack of clear language in the body of the compact indicating any state intent whatsoever to waive Eleventh Amendment immunities.

and be sued clause as involved in *Petty.* This court's language in *Edelman* distinguishing *Petty* is equally applicable to this case.[11]

> "Similarly, *Petty v. Tennessee-Missouri Bridge Comm'n, supra,* involved congressional approval, pursuant to the Compact Clause, of a compact between Tennessee and Missouri, which provided that each compacting State would have the power 'to contract, to sue, and be sued in its own name.' *The question of waiver or consent under the Eleventh Amendment was found in those cases to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity.*
>
> *"But in this case the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent.* Thus respondent is not only precluded from relying on this Court's holding in *Employees,* but on this Court's holdings in *Parden* and *Petty* as well." *Id.* p. 672. (Emphasis added).

C. Petitioner's Arguments Are Not Persuasive.

At pages 24-25 of the Brief for the Petitioners it is suggested that those provisions of the compact which indicate that Eleventh Amendment immunities are not available to TRPA constitute at least an indication of waiver of any

11. Further distinguishing *Petty* is the fact that it involved an agency operating in a "business field" (*Petty, supra,* at p. 280). The *Petty* court relied on two opinions involving California agencies operating in an enterprise capacity (*United States v. California* (1935) 297 U.S. 175; *California v. Taylor* (1956) 353 U.S. 553) to bolster the conclusion that states operating business enterprises should not be exempt from federal requirements. There is no similar circumstance in this case where California and Nevada have joined together to form a regulatory body for the purpose of protecting Lake Tahoe's environment. It is apparent that the TRPA serves a purely governmental purpose.

Eleventh Amendment immunity as to TRPA. We have agreed with petitioners, *supra,* at I, that the compacting states and Congress did not provide for the TRPA to be an agency of California and Nevada. However, to argue that the absence of Eleventh Amendment status somehow connotes a waiver of Eleventh Amendment immunity does not follow. Certainly the states, which did not intend TRPA to have any Eleventh Amendment status, could hardly be considered to have agreed to a waiver of an immunity not intended to be conferred. Secondly, as we have indicated previously, the premise of Eleventh Amendment immunity is to shield states from suits in federal court. If TRPA is not an arm of the state, there is no separate category of Eleventh Amendment waiver as to a non-state entity.

Finally, petitioners argue the need for federal court jurisdiction to avoid conflicting results between the courts of the compacting states. This concern is more hypothetical than real since we are unaware of any occasion when the courts of the two states have rendered conflicting rulings on matters affecting TRPA or parties dealing with TRPA. Furthermore, the 9th Circuit Court of Appeals has held on several occasions that the compact presents questions of federal law. *Jacobson v. Tahoe Regional Planning Agcy.* (9th Cir. 1977) 566 F.2d 1353, 1358; *League to Save Lake Tahoe v. B.J.K. Corp.* (9th Cir. 1977) 540 F.2d 1072; *League to Save Lake Tahoe v. Tahoe Regional Planning Agency* (1974) 507 F.2d 517. The 9th Circuit Court of Appeals opinion in *Jacobson, supra,* also held that an action would lie against the governing body members of TRPA to determine the validity of certain regulatory actions taken. *Jacobson, supra,* at p. 1360. Since issues involving interpretation of the compact are susceptible to federal jurisdiction as presenting federal questions and since the Governing Body

members can be appropriate defendants, the potential for conflicting results seems small indeed.

CONCLUSION

For the foregoing reasons California respectfully submits that the TRPA is not an alter ego of the state entitled to the shield of the Eleventh Amendment. Furthermore, even if California is in error on this point, the compact does not waive the state's Eleventh Amendment immunity.

Dated: October 4, 1978

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U. S.
FILED
OCT 21 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

No. 77-1327

LAKE COUNTRY ESTATES, INC., a corporation,
COUNTRY CLUB ESTATES, a partnership, and
BOULDIN DEVELOPMENT CORPORATION,
a corporation,
Petitioners,

vs.

TAHOE REGIONAL PLANNING AGENCY,
COUNTY OF EL DORADO,
STATE OF CALIFORNIA,
et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

No. 77-1327

LAKE COUNTRY ESTATES, INC., a corporation,
COUNTRY CLUB ESTATES, a partnership, and
BOULDIN DEVELOPMENT CORPORATION,
a corporation,
Petitioners,

vs.

TAHOE REGIONAL PLANNING AGENCY,
COUNTY OF EL DORADO,
STATE OF CALIFORNIA,
et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS JAMES HENRY AND WILLIAM BRINER

OPINIONS BELOW

The opinions of the lower courts are separately referenced in the brief for petitioners.

JURISDICTION

The jurisdictional statement seet forth in the brief for petitioners is accurate.

QUESTIONS PRESENTED

1. Are members of the legislative body of the Tahoe Regional Planning Agency entitled to absolute immunity for enactment of land use regulations as required by the Tahoe Regional Planning Compact?

2. Have petitioners shown the violation of a clearly established constitutional right?

3. Are Tahoe Regional Planning Agency governing board members personally liable for the value of property taken for public purposes without compensation?

STATUTES INVOLVED

The statutes involved are these:

1. Tahoe Regional Planning Compact, California Government Code Sections 66800-66801; Nevada Revised Statutes, Sections 277.190-277.230; Public Law No. 91-148; 83 Stats. 360. The text of the Compact is reproduced as Appendix E to the petition for certiorari.

2. 28 U.S.C. Section 1331 (a):

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity."

3. The United States Constitution, Amendment V:

> ". . . nor shall private property be taken for public use, without just compensation."

4. United States Constitution, Amendment XIV:

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

In 1969 "in order to encourage the wide use and conservation of the waters of Lake Tahoe and of the resources of the area around said Lake", Congress approved a compact between the States of California and Nevada creating the Tahoe Regional Planning Agency (Tahoe Regional Planning Compact, Act of Dec. 18, 1969, P.L. 91-148, 83 Stat. 360; Cal. Gov't Code, Secs. 66800-66801; Nev. Rev. Stat., Secs. 277.190-277.230 (hereinafter called Compact)).

The respective legislatures found, inter alia, that ". . . . the waters of Lake Tahoe and other resources of the Lake Tahoe region are threatened with deterioration or degeneration, which may endanger the natural beauty and economic productivity of the region", and that ". . . . the region is experiencing problems of resource use and deficiency of environmental control." (Compact, Art. I)

The Compact directed the TRPA legislative body to adopt a Regional Plan including land use, conservation, and preservation of scenic and natural resources, recreation, transportation, and public services (Compact, Art. V(b)) and to adopt ordinances and regulations to implement said plan. (Compact, Art VI)

In February, 1972, TRPA enacted its Land Use Ordinance implementing its previously enacted General Plan (R. 112). A portion of petitioners' property was designated "General Forest" and the remainder was designated "Conservation Reserve" (R. 112, 113, 117). While the

"General Forest" designation contemplates primarily recreational and timber harvesting activities (R. 77), the "Conservation Reserve" is not so limited. The purposes of said district are set forth in the Land Use Ordinance as follows:

> *"7.110 Conservation Reserve District*
>
> 7.111 Specific Purposes:
>
> (1) To identify those lands susceptible to future development pursuant to the preparation of specific plans indicating the impact on the region of the proposed land use, population density, transportation, flood control, environmental protection, community design, recreation, schools, and other necessary facilities." (R. 87)

The references in Section 7.111 to "population density", "community design", "transportation", and "schools", quite clearly show that development will be permitted provided a specific plan is submitted setting forth the environmental impact of the proposal.[1]

Petitioners applied to TRPA for amendment of the General Plan to delete both the "General Forest" designation and the "Conservation Reserve" designation, so as to allow development of their property for multiple residential, country club and commercial uses (R. 9). The TRPA staff expressed concern regarding the failure of the proposed development to comply with the constraints recommended in the environmental study submitted by the developer (R. 379). Although the TRPA refused to permit such unrestricted development (R. 380), the governing body, on its own motion, placed the entire property in "Conservation Reserve" so as to permit development consistent with the environmental constraints of the region. The concluding comment by the chairman of the governing board was

> "The purpose here is not to deny the development of the property, but to put it into a condition whereby a more orderly form of application can be made and we can come to grips with the real issues". (R. 381)

Petitioners did not see fit to prepare a specific plan for development pursuant to the "Conservation Reserve" requirement, but instead filed their "COMPLAINT FOR JUST COMPENSATION AND DAMAGES FOR TAKING OF PRIVATE PROPERTY FOR PUBLIC USE; INJUNCTION AND DECLARATORY RELIEF (R. 1).

The courts below having held that TRPA is immune from suit in the federal courts, petitioners now seek to recover damages against the individual governing board members on the ground that petitioners' property has been taken for public use without just compensation.

SUMMARY OF ARGUMENT

Members of the TRPA governing body are entitled to absolute immunity from liability for enactment of land use ordinances by TRPA. Said immunity is founded upon the settled doctrine of legislative immunity. This doctrine is particularly applicable to regional legislative bodies such

---

[1]The "Conservation Reserve" requirements are strikingly similar to the requirements of the National Environmental Policy Act for any activity involving a federal lease, permit, certificate, or entitlement for use, as well as the requirements of the California Environmental Quality Act for any developments requiring a governmental permit. Cf. 42 U.S.C., Secs. 4321, et seq.; Cal. Pub. Res. Code, Secs. 2100, et seq.; *Friends of Mammoth, et al. v. Board of Supervisors of Mono Co.*, 8 Cal.3d 247, 502 P.2d 1049 (1972).

as the TRPA governing body. Further, public policy requires absolute immunity to insure that the governing body has the freedom to enact regulations necessary for the protection of Lake Tahoe, without fear of personal liability to land speculators whose development plans may be frustrated.

Even if respondents were not entitled to absolute immunity, they are immune in this case by reason of the fact that petitioners have not shown the violation of a clearly established constitutional right.

In any event, the general jurisdiction statute (28 U.S.C., Section 1331) should not be extended to require that individual legislators acting under color of federal law provide just compensation for private property taken for public purposes.

RESPONDENTS HENRY AND BRINER ARE ABSOLUTELY IMMUNE FROM LIABILITY.

(A) Legislators Are Entitled to Absolute Immunity From Liability for Enactment of Legislation.

The only allegation against respondents Henry and Briner is that they were members of the governing board of TRPA which enacted the challenged Land Use Ordinance (R. 4).

This Court has consistently held that legislators are absolutely immune from liability for legislative acts. Federal legislators are entitled to common law immunity, as well as the immunity afforded Congress under the Speech and Debate Clause of the Constitution (*Kilbourn v. Thompson,* 103 U.S. 168 (1881)). The immunity of lower

level legislators, such as state legislators, is founded on the common law (*Tenney v. Brandhove,* 341 U.S. 367 1951)).

As stated in *McQuillin on Municipal Corporations* (1968) Vol. 4, p. 176:

> "That legislative officers are not personally liable for their legislative acts is so elementary, so fundamentally sound, and has been so universally accepted, that but few cases can be found where the doctrine has been questioned and judicially declared."

Although the immunity of local legislators for administrative actions, not directly related to legislation has been held to be less than absolute (See *Jones v. Diamond,* 519 F.2d 590 (5th Cir. 1975); *Cobb v. City of Maulden,* 202 F.2d 701 (1st Cir. 1953)), the rule is well recognized that even such local bodies are entitled to absolute immunity for enactment of legislation. (See *Martelli v. Pollock,* 162 Cal.App.2d 655, 328 P.2d 795 (1958); *Shellbourne Inc. v. Newcastle County,* 293 F.Supp. 237 (1968)).

The court in *Shellbourne,* held, at page 241:

> "Defendant members of the County Council are legislators being invested by the Delaware General Assembly with all the legislative powers of the county except as otherwise provided by state law. 9 Del. C. Sec. 1146. Zoning is a legislative function."

The court continued at page 242:

> "In determining the liability of lower legislative bodies a court is governed by principles of the common law. Under those principles the members of the County Council are entitled to claim an absolute immunity

from personal liability for acts within the scope of their legislative discretion."

As pointed out by this Court in *Kilbourn v. Thompson,* supra, legislative actions cannot be the foundation of any accusation or prosecution, action, or complaint in any court or place whatsoever.

The rule that legislative bodies are immune from suit for legislative acts was again enunciated by this Court in *New Orleans Water Works Company v. New Orleans,* 164 U.S. 471 (1896) wherein this Court held at page 482:

". . . a court of equity ought not, by any form of proceeding, to interfere with the course of proceedings in the city council of New Orleans, and enjoin that branch of its municipal government from hereafter passing ordinances similar to those heretofore enacted, and which are alleged to be obnoxious to the plaintiff's rights. The mischievous consequences that may result from the attempt of courts of equity to control the proceedings of municipal bodies when engaged in the consideration of matters entirely legislative in character, are too apparent to permit such judicial action as this suit contemplates. We repeat that when the city council shall pass an ordinance that infringes the rights of plaintiff, and is unconstitutional and void as impairing the obligation of its contract with the state, it will be time enough for equity to interfere, and by injunction prevent the execution of such ordinance. If the ordinances already passed are in derogation of the plaintiff's contract rights, their enforcement can be prevented by appropriate proceedings instituted directly against the parties who seek to have the benefit of them."

Cf. *Gas and E. Securities Co. v. Manhattan and Q. Traction Corp.,* 266 Fed. 625 (1920); *Begg v. New York,* 262 U.S. 196 (1923); *Clough v. Curtis,* 134 U.S. 161 (1890).

(B) TRPA Governing Board Members are Entitled to the Same Immunities as Federal and State Legislators.

In *Tenney v. Brandhove* (supra), the immunity from liability previously afforded Federal legislators was extended to members of a fact-finding committee established by resolution of the California Legislature.

The responsibilities thrust upon the members of the TRPA Governing Board are clearly greater than those of a mere legislative fact-finding committee, and the rationale for the grant of absolute legislative immunity is even more compelling.

No single state legislature could enact legislation, or establish a legislative committee to resolve the problems endangering the environment of Lake Tahoe. It required legislation by both California and Nevada, as well as the consent of Congress to create a regional legislative body with power to enact the legislation needed to preserve the ecology of the Lake Tahoe region.

The national interest in preserving the region is shown in S. Rep. 91-510, 91st Cong., 1st Sess., 115 Cong. Rec., 33068-33069 (1969):

"Only two other sizeable lakes in the world are of comparable quality—Crater Lake, in Oregon, which is protected as part of the Crater Lake National Park, and Lake Baikal, in the Soviet Union. Only Lake Tahoe, however, is so readily accessible from large

metropolitan centers, and is so adaptable to urban development."

The need for such legislation was succinctly stated by the California Supreme Court in *People, ex rel. Younger v. County of El Dorado,* 5 Cal.3d 480, 486 P.2d 1193 (1971), at page 486:

> "A staggering increase in population, a greater mobility of people, an affluent society and an incessant urge to invest, to develop, to acquire and merely to spend—all have combined to pose a severe threat to the Tahoe Region. Only recently has the public become aware of the delicate balance of the ecology, and of the complex interrelated natural processes which keep the Lake's waters clear and fresh, preserve the mountains from unsightly erosion, and maintain all forms of wildlife at appropriate levels. Today, and for the foreseeable future, the ecology of Lake Tahoe stands in grave danger before a mounting wave of population and development."

Members of the Governing Body of TRPA, charged with protecting a region of national importance, and with legislative responsibilities transcending the boundaries of any one state, should be given the same freedom to act without fear of personal liability as is given to state legislatures and their committees.

(C) Public Policy Requires Absolute Immunity for the TRPA Governing Board Members.

Attempts to regulate development of the Lake Tahoe region so as to protect the ecology without unduly restricting private property rights are predestined to create controversy.

On the one hand, environmentalists complain that the regulation is not stringent enough (See *League to Save Lake Tahoe v. Tahoe Regional Planning Agency,* 507 F.2d 517 (9th Cir. 1974); action for declaratory and injunctive relief alleging that TRPA has not adopted adequate controls over development as required by the Compact).

On the other hand, land speculators such as petitioners herein claim that such controls are so stringent as to constitute a taking of private property for public purposes.

The individual governing board members have little to fear if they should abrogate their responsibility to adopt the regulations necessary to protect the ecology of Lake Tahoe.

If, however, the individual board members are subjected to liability for the adoption of such regulations, the repercussions with which the board members may be faced are serious indeed. The gravity of such extension of liability is clearly shown in this case, wherein petitioners, having been denied the specific commercial development which they proposed, are now requesting that the individual members of the governing board be held liable for 25 million dollars, the entire value of petitioners' property.

Respondents herein are placed very much in the position of the prosecuting authorities in the case of *Butz v. Economou,* ..... U.S. ....., 57 L.Ed.2d 895, wherein this Court held at page 921:

> "While there is not likely to be anyone willing and legally able to seek damages from the officials if they do not authorize the administrative proceedings (citation), there is a serious danger that the decision to

> authorize proceedings will provoke a retaliatory response. . . . when millions may turn on regulatory decisions there is a strong incentive to counter-attack."

As stated by this Court in *Tenney v. Brandhove* (supra) at page 377:

> "One must not expect uncommon courage, even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader or to the hazard of a judgment against them based on a jury's speculation as to motive."

If, with the benefit of hindsight, it appears that the TRPA Land Use Ordinance is unduly harsh in restricting development, declaratory and injunctive relief are available (*Jacobson v. Tahoe Regional Planning Agency,* 566 F.2d 1353 (1977)). The extension of *Bivens* to create personal liability on the part of the individual governing board members is not necessary to project the rights of petitioners and seems clearly unfair to the governing board members.

Thus, even if absolute legislative immunity were not available, the unique functions of the individual respondents in this case require such immunity. As stated by this Court in *Butz v. Economou* at page 917:

> "Our decisions recognize that there are some officials whose special functions require a full exemption from liability."

Governing board members being faced with the spectre of personal liability in millions of dollars to land speculators will be hard-pressed to take the bold measures mandated upon them to enact the measures necessary to protect the Lake Tahoe environment.

It is submitted that this public policy reason is more than sufficient to leave the petitioners to their remedies in injunctive and declaratory relief, or, if damages are appropriate, to an action against the responsible public agency.

For these reasons, the individual respondents should be granted absolute immunity for the enactment of land use regulations designed to protect the Lake Tahoe environment.

PETITIONERS HAVE NOT SHOWN A CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT TO THEIR DEVELOPMENT.

In *Procunier v. Navarette,* ..... U.S. ....., 55 L.Ed.2d 24 (Feb. 22, 1978) this Court reiterated the longstanding rule that, even those governmental officials who are not entitled to absolute immunity are immune from suit for violation of constitutional rights, unless the right alleged to be violated is "clearly established" at the time of the violation.

The enactment of the Conservation Reserve Zone regulating development of petitioners' property did not violate any such "clearly established" right. Petitioners did not have a vested right to develop as they saw fit. As stated by this Court in *Penn Central Transp. Co. v. New York City,* ..... U.S. ....., 57 L.Ed.2d 631 at p. 652:

> ". . . . the submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable."

California law had clearly established that petitioners did not have a vested right to develop by reason of the El Dorado County approval of their proposal. See *AVCO Community Developers Inc. v. South Coast Regional Commission,* 17 Cal.3d 785, 533 P.2d 546 (1976) wherein it was held that the obtaining of a grading permit, approval of a final tract map, on-site grading, subdivision improvements, and expenditures in excess of two million dollars in preparatory work do not establish a vested right. The court in *AVCO* stated at page 793:

> "By zoning the property or issuing approvals for work preliminary to construction the government makes no representation to a land owner that he will be exempt from zoning laws in effect at the subsequent time he applies for a building permit or that he may construct particular structures on the property, and thus the government cannot be estopped to enforce the laws in effect when the permit is issued."

It is not likely that respondents could have perceived that requiring petitioners to comply with the environmental constraints of the Conservation Reserve District might constiute the taking of property without due process of law. Although the environmental constraints would undoubtedly affect the value of the property somewhat, diminution in value, in and of itself, had not been held to be a "taking". See *Hadacheck v. Sebastian,* 239 U.S. 394, 60 L.Ed.2d 348, 36 S.Ct. 143 (1915) (87½% diminution in value held not to be a "taking"). The California Supreme Court has upheld a zoning ordinance prohibiting the quarrying of gravel in the face of the trial court's finding that the subject property was of great value if used for gravel excavation but of "no appreciable economic value"

for any other purpose and that any suggestion that the property has economic value for any other purpose "is preposterous" (*Consolidated Rock Products Co. et al. v. City of Los Angeles,* 57 Cal.2d 515, 370 P.2d 342 (1962)).

Even this Court in its last term was divided five to four on the issue of how far land use regulation may go before it constitutes a taking (*Penn Central Transp. Co. v. New York City,* ..... U.S. ....., 57 L.Ed.2d 631 (June 26, 1978)).

To require the members of the TRPA governing board to have the percipience to predict the exact boundaries of their powers in regulating land to protect the environment in the face of a legislative mandate to adopt all necessary regulations to preserve the Lake Tahoe region, is simply asking too much.

A DAMAGES REMEDY IS NOT APPROPRIATE UNDER 28 U.S.C., SEC. 1331, IN ALL INSTANCES.

The Court of Appeals herein held that a cause of action in damages could be stated against the individual defendants under the general jurisdictional statute (28 U.S.C., Sec. 1331), relying upon *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L Ed.2d 619 (1971). In *Bivens,* this Court was faced with the issue of whether an innocent victim of an illegal search and seizure in violation of the Fourth Amendment should be entitled to a remedy in damages, as opposed to no remedy at all. This Court pointed out that the Constitutional violation could not be vindicated by quashing the evidence obtained, since there was no criminal prosecution. As stated by Justice Harlan in his concurring opinion (403 U.S. p. 409):

"Putting aside the desirability of leaving the problem of federal official liability to the vagaries of common law action, it is apparent that some form of damages is the only possible remedy for someone in Bivens' alleged position."

In *Butz v. Economou,* ..... U.S. ....., 57 L.Ed.2d 895 (1978), this Court declined to extend *Bivens* beyond Fourth Amendment claims (57 L.Ed.2d 895, p. 903, Footnote (8)):

"The Court's opinion in *Bivens* concerned only a Fourth Amendment claim and therefore did not discuss what other personal interests were similarly protected by provisions of the Constitution. We do not consider that issue here. Cf. *Doe v. McMillan,* 412 U.S. 306, 325, 36 L.Ed.2d 912, 93 Supreme Court 2018 (1973)."

BIVENS DID NOT PURPORT TO CREATE A CAUSE OF ACTION IN INVERSE CONDEMNATION AGAINST INDIVIDUAL LEGISLATORS. NO INDIVIDUAL SHOULD BE HELD PERSONALLY LIABLE FOR THE TAKING OF PRIVATE PROPERTY FOR PUBLIC PURPOSES.

Petitioners do not allege that the TRPA governing board members have taken private property for their own uses. Rather, they allege that the TRPA regulations have the effect of taking petitioners' property for public uses without just compensation.

The courts have not been hesitant to prevent the taking of private property for public purposes without just compensation. Where the taking is by physical invasion, the right to compensation is clear (*Jacobs v. U.S.,* 290 U.S. 13 (1933)). Where the taking is in the guise of regulation,

there appears to be no clear line between those cases wherein compensation is awarded, and those wherein the regulation is simply held invalid.[2]

In all cases, however, where damages have been awarded, it is the *public* which has been required to pay.

As stated by this Court in *Boom v. Patterson,* 98 U.S. 403 (1878) p. 406:

"The right to eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. The clause found in the Constitutions of the several states providing for just compensation for property taken is a mere limitation upon the exercise of the right."

Thus, if petitioners' property has been taken in violation of petitioners' Fifth Amendment rights, it has been taken by the sovereign, and it is the sovereign which is responsible for just compensation.

As stated by this Court in *Armstrong v. U. S.,* 364 U.S. 40 (1960):

"Fifth Amendment guarantee that private property shall not be taken for a public use without just com-

---

[2]*Arastra Ltd. Partnership v. City of Palo Alto,* 401 F.Supp. 962 (No. Dist. Cal. 1975); City made firm decision to purchase plaintiff's property, appropriated funds for acquisition, and adopted a zoning ordinance preventing all development.

"The plain and admitted object of the open space ordinances was to achieve the same result to the full extent as possible, as would have been achieved through purchase of the land itself." (Damages in inverse condemnation awarded.)

Cf. Penn. Coal v. Mahan, 260 U.S. 393 (1922) Statute prohibiting coal mining adopted to protect owners of surface rights who had assumed the risk of subsidence held invalid. *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills,* 40 N.J. 539, 139 Atlantic 2d 232 (1963); Fill ordinance designed to preserve swamp in hope of future acquisition held invalid.

pensation was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

If TRPA has overstepped its bounds in regulating the uses of private property for the protection of the public, and if a damages remedy is appropriate, then any such damages should be paid by the public which benefited from the regulations and not the individual legislators whose actions were taken for the benefit of the public.

It is one thing to hold governmental officials, acting for their own selfish interests, personally responsible for damages they have caused by wilful violation of personal interests protected by the Constitution.

It is quite another to hold that, where property is taken for public purposes without just compensation, the public is entitled to retain the benefits of the "taking", but the compensation must be paid by the members of the governing body of the public agency allegedly responsible for the taking.

If the regulation in question has the effect of a compensable taking under the Fifth Amendment, then the regulation should either be set aside, or compensation paid from the public treasury.

CONCLUSION

If the TRPA Land Use Ordinance is overly restrictive, petitioners have an adequate remedy by way of injunctive and declaratory relief.

If the TRPA land use regulations have the effect of taking petitioners' property for public purposes without just compensation and, assuming, arguendo, that damages is an appropriate remedy, petitioners are free to proceed against the public agency responsible for the taking.

It is a novel and disturbing concept that individual legislators acting for the benefit of the public, under color of federal law, should be held personally liable to provide just compensation for private property taken for public purposes.

Neither precedent nor public policy justifies the imposition of such liability in this case.

Dated: October 17, 1978.

Respectfully submitted,
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FOR ARGUMENT

Supreme Court, U. S.
FILED
OCT 21 1977
MICHAEL RODAK, JR., CLERK

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TAHOE REGIONAL PLANNING AGENCY, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CERTAIN RESPONDENTS

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

No. 77-1327

LAKE COUNTRY ESTATES, INC., a corporation, COUNTRY CLUB ESTATES, a partnership, and BOULDIN DEVELOPMENT CORPORATION, a corporation,
Petitioners,

vs.

TAHOE REGIONAL PLANNING AGENCY, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CERTAIN RESPONDENTS

OPINIONS BELOW

The opinions of the lower courts are adequately referenced in Petitioners' Brief.

JURISDICTION

The jurisdictional statement set forth in Petitioners' Brief is accurate.

QUESTIONS PRESENTED

1. Is a cause of action for damages properly implied pursuant to 28 USC § 1331 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for Fifth and Fourteenth Amendment due process claims emanating from comprehensive land use and environmental measures enacted pursuant to an interstate compact which allegedly cause adverse economic consequences as applied to petitioners' property?

2. Are TRPA's Governing Body members, who act by virtue of an interstate compact which constitutes a governing body of five (5) members from each state and one federal representative with jurisdiction over portions of two states, immune from damage claims arising from their enactment of Compact-authorized ordinances?

3. Does the Eleventh Amendment provide immunity from suit in federal district court to TRPA, a compact-created governmental entity performing environmental and land use functions in portions of two states with Governing Body voting membership composed of an equal number of representatives from each state?

4. Does TRPA, a bi-state governmental agency created by interstate compact, waive Eleventh Amendment immunity when the Compact creating it terms it a political subdivision of *both* states for limited purposes?

STATUTES INVOLVED

With the exception of 42 USC § 1983, Petitioners' Brief adequately references the pertinent statutes. No issue per-

taining to 42 USC § 1983 was presented prior to certiorari nor is the statute remotely, much less "fairly", comprised within the issues presented prior to the granting of certiorari. As such, no issue pertaining to 42 USC § 1983 is before the Court.

STATEMENT OF THE CASE

In 1968, California and Nevada adopted identical statutes envisioning the creation of a bi-state governmental entity with jurisdiction over the watershed area of the Lake Tahoe Basin, an area encompassing portions of both states. [California Government Code §§ 66800-66801; §§ 277.100-277.200 N.R.S.]. In 1969, Congress conditionally consented to the proposed Compact [Act of December 18, 1969, Public Law 91-148, 83 Stat. 360]. In 1970, upon joint proclamation of the governors, TRPA was called into existence [§ 277.100 N.R.S.; Compact, Article III(j)].

TRPA was created upon the joint legislative findings of Congress and the legislatures of Nevada and California that: (a) the waters and other resources of the region are threatened with deterioration or degeneration endangering the region's beauty and economy; (b) the region is experiencing problems of resource use and deficiencies of environmental control; and (c) there is a need to balance the region's natural and manmade environment by enhancing governmental effectiveness through TRPA [Article I, Compact]. Created with dual Compact goals of "resource conservation and orderly development" [Article I(c), Compact], TRPA is "to provide for the region as a whole the planning, conservation and resource develop-

ment essential to accommodate a growing population within the region's relatively small area without destroying the environment". *Younger v. County of El Dorado,* 5 Cal.3d 480, 488, 487 P.2d 1193 (1971).

The Compact requires that TRPA adopt a regional plan which must include at least the following elements:

(i) An integrated land use plan for the entire region;

(ii) An integrated transportation plan dealing with all modes of transportation and pertinent facilities;

(iii) A conservation plan for the preservation and management of the scenic and other natural resources of the region;

(iv) A recreation plan for the development, utilization and management of recreational resources within the region; and

(v) A public services and facilities plan [Article V(b), Compact].

Such Regional Plan is required to be formulated and maintained after public hearings and upon due consideration by TRPA's Governing Body of the plans, activities, desires and recommendations of state, local and federal governmental entities and the private sector [last paragraph of Article V(b), Compact]. Enforcement of the adopted plan is imposed on the states, TRPA and local government [Article V(c), Compact].

TRPA is empowered to adopt "all necessary ordinances, rules, regulations and policies to effectuate the adopted Regional Plan" on a broad spectrum of subjects including: water quality, air pollution, watershed protection, flood

plain protection, soil and sedimentation control, waste disposal, zoning, subdivision, grading, and water related developments [Article VI(a), Compact]. Enforcement of adopted ordinances, rules, regulations, and policies is imposed on the states, TRPA and local government [Article VI(b), Compact].

TRPA is empowered to review private development proposals and public works projects of local government [Article VI(k) and (c), Compact]. Public works projects and related programs of the states, however, need only be submitted for advisory TRPA review and the states can construct such projects as they desire [Article VI(d), Compact].

The Compact affords TRPA neither the power to condemn property nor the funding which would be necessary for the exercise of such power nor any procedures for its exercise.

The Compact constitutes a governing body of TRPA. The Governing Body is divided equally between the two states (five from each) plus one appointee of the President of the United States [Article III(a) and §3, Compact]. Each state's Governing Body members are three elected officials of local government and two representatives of state government [Article III(a), Compact].

Although TRPA is authorized to accept grants and subventions and collect fees for its services, the only fixed funding of TRPA is imposed by the Compact on local government within the region. Not more than $150,000.00 is required to be paid to TRPA by local government [Article

VII, Compact].[1] As noted in Petitioners' Briefs herein, the fact that the majority of TRPA's funding is derived from state and federal grants is entirely a matter of their largesse, as the Compact contains no requirement that the states or United States do so. Indeed, the states are expressly freed of any liability for contractual debts of TRPA [Article VII(f), Compact].

Petitioners are the owners of, or have an interest in, real property within the region which is subject to TRPA's jurisdiction [R. 112:1-13; R. 116:26-30].

Pursuant to Compact requirements [Articles V(b) and VI, Compact], TRPA adopted its Regional Plan on December 22, 1971 [R. 112:6 and R. 117:16], and *Land Use Ordinance* on February 10, 1972 [R. 112:26-29]. The Regional Plan classified a portion of petitioners' property "General Forest" and the remainder "Conservation Reserve" [R. 112:29-30; R. 113:1-2; and R. 117:16-17].

Desiring to develop their property inconsistent with TRPA's classifications, petitioners submitted a (self-proclaimed) vague [R. 380] master plan to TRPA which application was denied [R. 372-381].

TRPA *sua sponte* rezoned petitioners' land to Conservation Reserve permitting development in accordance with a comprehensive development proposal ("specific plan") and requested petitioners apply for specific plan approval [R. 380; R. 87; R. 113:11-15; and R. 117:27-118:1].

[1]The validity of these exactions have been uniformly upheld upon local governments' refusals to pay. *Younger v. County of El Dorado, supra; List v. County of Douglas,* 90 Nev. 72, 524 P.2d 1271 (1974).

Rather than submit the specific plan solicited by TRPA, petitioners filed this suit, unilaterally concluding that TRPA's single refusal to approve their master plan forever prohibited any use of land [R. 113:16-19; 118:2-5]. No development application other than the vague master proposal has ever been tendered by petitioners to TRPA [R. 113:24-28; 118:10-13; 108-132].

On April 16, 1973, petitioners filed a complaint in the United States District Court for the Eastern District of California against TRPA, El Dorado County, the States of California and Nevada, the then members of TRPA's Governing Body and TRPA's then Executive Officer [R. 1-28]. The complaint as amended alleges that TRPA's Regional Plan and *Land Use Ordinance* as applied to petitioners' property has rendered the property valueless thereby taking the property without just compensation and without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution [R. 108, *et seq.*]. Petitioners seek damages in the sum of $31,899,900.00, and injunctive and declaratory relief [*Id.*]. Jurisdiction of the District Court was invoked pursuant to 28 USC §§ 1331, 1343, and 2201 [*Id.*]. Motions to dismiss were filed by some of the defendants.[2]

Judgment of dismissal was entered by the District Court on December 16, 1975 [R. 634]. It found that although the complaint, under customary pleading rules, would be sufficient to state a cause of action in inverse condemnation, such a cause of action was not available against TRPA by virtue of its lack of condemnation powers [*Id.*]. Ac-

[2]No such motions were filed on behalf of the states due to petitioners' failure to serve process on either.

cordingly, TRPA was dismissed. The District Court dismissed the complaint as to the individual defendants on the grounds that they are immune from liability for damages [*Id.*]. It also dismissed all other defendants [*Id.*].[3]

Petitioners timely appealed. For purposes of oral argument only this case was consolidated with three other cases involving TRPA [A. 3]. On August 5, 1977, the Ninth Circuit Court of Appeals rendered its initial opinion herein [A.P. 25-57]. By that opinion, the Ninth Circuit affirmed the District Court's determination that inverse condemnation and monetary relief are inappropriate against TRPA, that the individual defendants are absolutely immune from actions for damages arising from legislative acts and that all other defendants were appropriately dismissed [*Id.*]. It reversed the District Court, however, on the propriety of declaratory and injunctive relief against TRPA [A.P. 35 and 55], and remanded for factual development of whether the acts of the individual defendants were legislative or executive in nature [A.P. 47-48]. In finding the possibility of monetary relief against the individual defendants, the Court of Appeals deemed it appropriate to extend the "constitutional tort" remedy fashioned by this court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), for a party deprived of Fourth Amendment rights to these Fifth and Fourteenth Amendment due process claims.

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[3]Since petitioners do not assert error in the dismissal of other parties defendant (i.e., the states and county), we do not discuss the lower courts' grounds therefor nor do we hereinafter brief the propriety of those dismissals.

TRPA petitioned for rehearing [A. 3]. On December 21, 1977, the Circuit Court withdrew its August 5, 1977, opinion and issued a second opinion in its place [A.P. 1-24]. The second opinion's only pertinent departure from the first opinion is it holds TRPA immune from federal court suit.[4] TRPA's immunity from federal court action was premised on the Eleventh Amendment, an issue which had been briefed and argued in the District Courts and the Court of Appeals in connection with the propriety of federal court suit against the states [A.P. 6-9]. Consistent with its initial opinion regarding the Eleventh Amendment immunity of California and Nevada, the Court of Appeals held that TRPA is also immune from federal court suit pursuant to the Eleventh Amendment. In doing so, it separately relied upon the opinion of this Court in *Petty v. Tennessee Missouri Bridge Commission,* 359 U.S. 275 (1959), and upon the analysis of the Eighth Circuit opinion in *Petty,* 254 F.2d 857 [A.P. 7-8].

Accordingly, the Court of Appeals held that action against TRPA in federal court is proscribed by the Eleventh Amendment and litigants who desire to proceed in federal court rather than state court with claims questioning the actions of TRPA can do so only against officers of TRPA. As to claims against the individual defendants for damages, the Court of Appeals found absolute immunity for actions undertaken within the scope of their

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[4]Three other cases were the subject of the opinions hereinbelow. Consistent with petitioners' briefs, we omit reference to the facts and issues therein and to the lower courts' determinations unique to those cases because the parties in those separate actions did not seek certiorari and all cases were the subject of separate judgments in both District Courts and the Court of Appeals. Supreme Court Rules 21(4) and 23(5).

legislative activities and qualified immunity for their authorized non-legislative acts in accordance with *Wood v. Strickland,* 420 U.S. 308 (1974). Petitioners attack both determinations and respondents attack the extension of *Bivens* to these claims.

ARGUMENT

1. NO ISSUE PERTAINING TO THE CIVIL RIGHTS ACT OF 1871 [42 USC § 1983] IS APPROPRIATELY BEFORE THE COURT. FURTHER, THE LACK OF TRUE ADVERSITY ON THAT ISSUE, SEVERE DOUBT AS TO PROPRIETY OF EXTENDING § 1983 TO ACTIONS AGAINST STATES, AND THE NATURE OF THE COMPACT ENTITY BEFORE THE COURT, ALL COUNSEL THAT THE COURT NOT CONSIDER THE PROPRIETY OF EXTENDING § 1983 HEREIN.

A. The Applicability of § 1983 to This Claim Was Neither an Issue Upon Which Certiorari Was Granted Nor Fairly Comprised Within Such Issues.

In neither the petition nor the respondents' briefs in opposition to the petition nor the reply brief is any issue framed concerning the application of Civil Rights Act of 1871 herein.

To be sure, the complaint below asserted such claims [R. 189 and A. 5-6]. Further, the opinion hereinbelow squarely addressed and rejected the § 1983 claims [A.P. 14-15]. Despite such a clearly presented controversy over the application of § 1983 to these claims, petitioners deemed it appropriate to raise no § 1983 questions herein.

Supreme Court Rule 23.1(c) specifically precludes a litigant from injecting issues not raised before certiorari is granted.

No question of the propriety of applying § 1983 to this claim is "fairly comprised" within the issues tendered to this Court on certiorari [Supreme Court Rule 23.1(c)]. Although four questions are presented by the petition, they can be fairly summarized in two:

(1) The amenability of TRPA to suit in federal court in view of the Eleventh Amendment (and a related contention of waiver of such immunity); and

(2) The scope of immunity of individual TRPA Governing Body members for their acts.

Neither can be cogently urged to fairly comprise § 1983 questions. The application of the Eleventh Amendment to TRPA is couched entirely in terms of the position that compact entities occupy in the union and an analysis of the provisions of the Compact. The entire Eleventh Amendment argument deals with TRPA's amenability to suit in federal court. It does not remotely address the appropriate remedy if TRPA is so amenable.

Nor does the question of the scope of immunity for TRPA's Governing Body members for acts within the scope of their authority comprise § 1983 issues. Questions concerning immunities can, and often do, comprise such issues because such immunities are addressed in the context of § 1983 acts, see e.g., *Procunier v. Navarette,* 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978), but such is untrue here. The Court of Appeals reached immunity ques-

tions in this case only because of its extension of *Bivens* to these due process claims [A.P. 15-17]. In accordance with the view subsequently sanctioned by this Court in *Butz v. Economou,* ..... U.S. ....., 57 L.Ed.2d 895, 911-914 (1978), the Court of Appeals examined such immunities for *Bivens*-type actions by analogy to § 1983 immunity cases [A.P. 17]. Analysis of the metes and bounds of § 1983 (particularly, who is and who is not a "person" thereunder) was completely unnecessary to its assessment of appropriate immunities. Questions regarding the scope of immunity from damage actions simply cannot be said to fairly comprise the propriety of a legal theory of liability rejected by the lower court. cf. *Procunier v. Navarette, supra,* 434 U.S. at 566-567, 55 L.Ed.2d at 34 (dissenting opinion of Chief Justice Burger) and *Namet v. United States,* 373 U.S. 179, 190 (1963).

In *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274, 278-279 (1977) this court refused to consider whether an extension of § 1983 or an extension of *Bivens* justified a damage action against a public entity where such contention was not briefed prior to certiorari. There, as herein, no need arises to reach out for such a "jurisdictional" question, when the complaint alleges jurisdiction under both § 1331 and § 1343.

Petitioners may not so belatedly insert new issues.

B. Petitioners and Respondents Are Insufficiently Adverse Concerning This § 1983 "Issue" to Warrant Entertaining Same.

As petitioners frame the "issue", the Eleventh Amendment should not be a bar to § 1983 actions. Petitioners'

contention in this regard is predicated on this Court's recent opinion in *Monell v. Department of Social Services of the City of New York,* ..... U.S. ....., 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), that a local school board is a "person" subject to § 1983 suit. Relying on this Court's holding in *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976), which allegedly finds an exception to Eleventh Amendment immunity when Congress imposes a duty upon the states necessary to the effectuation of the Fourteenth Amendment, petitioners urge that a similar holding is required for § 1983 actions. Such result would necessarily include a finding that states are subject to § 1983 suit. That this finding would have far reaching effects cannot be gainsaid.[5] That such a finding would be a significant extension of *Monell* is equally clear.[6]

Yet petitioners ask this court to address such a significant issue not only in the context of the lack of any such issue being implicitly (much less squarely) presented on certiorari, but, as petitioners admit,[7] in the absence of the states.

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[5]See *Mt. Healthy City Board of Education v. Doyle, supra,* 429 U.S. at 278.

[6]The majority and dissenting opinions in *Monell* meticulously avoid any language which could be read as extending to the states. See, e.g., the manner in which the issue before the Court is framed ("local government officials" and "local governments"), *Monell v. New York City Department of Social Services, supra.,* 56 L.Ed.2d 618 and 619. Further, the opinions of both the majority and the dissent specifically restrict the case to "local government units" rather than states. *Id.* 56 L.Ed.2d at 635 n. 54 (majority opinion) and *Id.* 56 L.Ed.2d at 655 n. 4 (dissenting opinion).

[7]See page 4, note 3 and page 7, note 6 of petitioners' brief and pages 10-25 of the petition. Petitioners assert no error as to the dismissal of the states by the Court of Appeals' holdings that the states are immune pursuant to the Eleventh Amendment and did not waive such immunity. The acknowledgment of lack of adversity with the states completely belies petitioners' attempt to insert this "issue".

Insufficient adversity exists between petitioners and these respondents on this "issue". TRPA, like any other entity which is but an agency of the states for limited purposes, lacks the familiarity and the interest in the panoply of state activities necessary to fully present the policy issues and the implications of extending § 1983 suits to the states. We submit it is unwise to undertake examination of such issue until it is squarely presented between adversaries who have a complete stake in the "issue".

C. Even if § 1983 Claims Were Appropriately Before This Court, They Are Improper Against These Respondents.

Section 1 of the Civil Rights Act of 1871 affords a remedy for deprivation of constitutional rights under *color of state law*. The italicized language is not gloss.

> "Every person who, *under color of any statute, ordinance, regulation, custom, or usage, of any State* or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."
>
> 42 USC § 1983 [emphasis supplied].

Consistent with the express language of the statute, the cases uniformly hold that one seeking to state a claim for relief under § 1983 must allege facts supporting the conclusion that his civil rights have been transgressed under color of state law. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 150 (1970) and *District of Columbia v. Carter*, 409 U.S. 418 (1973).

Contrary to the express language of the statute, as was expressly held by the Court of Appeals [A.P. 14-15 and 4], TRPA acts under federal rather than state law. *League to Save Lake Tahoe v. TRPA*, 507 F.2d 517, 523 (9th Cir. 1974) *cert. den.* 420 U.S. 974 (1975). As such, there is no state law aspect incident to the alleged deprivations herein sufficient to afford a § 1983 claim.

Attempts to extend § 1983 claims to those acting under federal rather than state law have been uniformly rejected. *Savage v. United States*, 450 F.2d 449 (8th Cir. 1971) *cert. den.* 405 U.S. 1043; *Sigue v. Texas Gas Transmission Corp.*, 354 F.2d 40 (5th Cir. 1955); cf. *District of Columbia v. Carter, supra*, 409 U.S. 418; *Environmental Defense Fund v. Corp of Engineers*, 325 F.Supp. 728 (D.Ark. 1971); *Danner v. Moore*, 306 F.Supp. 433, 436 (W.D.Pa. 1969); *Stinson v. Finch*, 317 F.Supp. 581 (D.Ga. 1970).

That petitioners complain of acts under color of federal law rather than state law is clear both from the complaint and the Compact. All respondents are pursued for their nexus with TRPA, an entity which receives authority exclusively from, and must act consonant with, the Compact. Article I, § 10, Cl. 3 of the Constitution of the United States; and *Younger v. TRPA*, 516 F.2d 215 *cert. den.* 423 U.S. 868. It is that federal law, the Compact, which requires respondents' adoption and enforcement of plans and ordinances. [Articles V(d) and (c) and VII(a) and (b)].

Petitioners would have TRPA exercising a species of state law by virtue of the fact that the Tahoe Regional

Planning Compact is codified by the two states. To be sure, as petitioners urge, the promulgation of a compact requires legislation by the states. Article I, § 10, Cl. 3 of the Constitution of the United States. However, that the Compact clause does not make such state legislation self-operating but only authorizes same upon "the consent of Congress". As such, the state law which petitioners seek color of is absolutely ineffective until ratified by Congress and thereupon made a law of the United States. *League to Save Lake Tahoe v. TRPA, supra.*

Insofar as petitioners desire *Monell* extended because TRPA is an agency of the states, petitioners cite the very death knell of their argument. So, the majority and dissenting opinions in *Monell* observe that § 1983 suits do not extend to the states. *Monell v. New York City Department of Social Services, supra,* 56 L.Ed.2d at 635 n. 54 and *Id.,* 56 L.Ed.2d at 655 n.4. Further, subsequent to *Monell* this Court rejected an action seeking to extend § 1983 to the states. *Alabama v. Pugh,* ..... U.S. ....., 98 S.Ct. 3057, 57 L.E.2d 1114 (1978).

Petitioners' Civil Rights Act claims are neither before the Court nor substantive.

2. THE COURT OF APPEALS ERRED IN EXTENDING BIVENS TO THIS CONTROVERSY.

The Court of Appeals found that petitioners can maintain an action against the individual defendants for monetary relief. In so finding, it reasoned that *Bivens v. Six Unknown Named Agents of Federal Bureua of Narcotics, supra,* should be extended to these due process claims [A.P. 15-17].

The Court of Appeals' extension of *Bivens* is unsound.[8] Such extension of *Bivens* to cover property interests as distinguished from the personal interests in liberty protected by *Bivens* is an unwarranted extension of that case. Further, *Bivens* is premised on the unavailability or inadequacy of alternative remedies such as injunctive and declaratory relief, a circumstance which does not exist here. In affording a "constitutional tort" remedy for alleged due process violations, the Court of Appeals overlooks the very limitations acknowledged by this Court which counsel caution in creating such a remedy for other than Fourth Amendment claims. *Bivens* should not be extended to the range of interests colorably characterizable as due process claims. Nor should *Bivens* be extended to areas of essentially and historically state activity such as land use. *Bivens* should afford the severe sanction of monetary relief only where a manifest deprivation of a well-defined constitutional right occurs, not, as here, in an area where even this Court has found difficulty in ascertaining where land use regulation ends and Fifth or Fourteenth Amendment taking begins.

A. Since Petitioners Seek the Vindication of Property Rather Than Personal Rights, Bivens Should Not Be Extended to this Case.

In *Bivens v. Six Unknown Named Agents, supra,* this Court found damages an appropriate remedy for the deprivation of personal property by federal agents in the

[8]The propriety of extending *Bivens* to this case is an issue raised prior to the granting of certiorari herein (see, e.g., Brief for Respondents JAMES HENRY and WILLIAM BRINER in Opposition to Petition for Certiorari at pages 3 and 12-15).

course of an unlawful search and seizure. In so holding, this Court viewed damages as an unsurprising remedy in view of its historically consistent protection of *personal* liberties.

> "Historically, damages have been regarded as the ordinary remedy for an invasion of *personal* interests in liberty." *Id.* 403 U.S. at 395, 91 S.Ct. at 2004. [Emphasis added; citations omitted.]

Subsequent authority of this Court emphasizes that the remedy implied in *Bivens* deals with a uniquely personal constitutional right.

> "The court's opinion in *Bivens* concerned only a Fourth Amendment claim and therefore did not discuss what other *personal* interests were similarly protected by provisions of the Constitution. We do not consider that issue here." *Butz v. Economou, supra,* 57 L.Ed.2d at 903, n. 8. [Emphasis supplied.]

The personal interest of the petitioner in *Bivens* to be free from unlawful searches and seizures is vastly different from the real property interest sought to be vindicated by petitioners herein. Petitioners complain that TRPA's land use regulations so impact petitioners' property as to constitute a *de facto* taking thereof. The interest pursued is not the intrusion into personal privacy of the unlawful search and seizure condemned in *Bivens*.[9] It is that Fifth Amendment regulation of property area where:

> ". . . [T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice

[9]Justice Harlan articulates the need to afford such a draconian remedy because "the personal interest protected by the Fourth Amendment are those we attempt to capture by the nation of 'privacy' . . ." 403 U.S. at 408.

> and fairness' require that economic injuries caused by public action be compensated by the Government, rather than remain disproportionately concentrated on a few persons." *Penn Central Transportation Co. v. New York City,* ___ U.S. ___, 57 L.Ed.2d 631, 648 (1978).

Whether examined from the perspective of the fundamental difference between economic and personal interests, articulated by Justice Stewart in *Dandridge v. Williams,* 397 U.S. 471 (1970), or the judicial activism or restraint attendant upon whether the Court deals with "preferred freedoms" initially articulated by Chief Justice Stone in *United States v. Carolene Products Co.,* 304 U.S. 144, n. 4 (1938), this Court's characterization of Biven's interest as "personal" is significant. Legislation affecting economic interests lacks both the judicial definition, see *Penn Central Transportation Co. v. New York City, supra,* and the finality of an accomplished interference with personal interests such as the search and seizure in *Bivens.* A monetary remedy should not be extended to these non-personal interests.

B. The Availability Of The Adequate Remedies Of Declaratory Relief Or Injunction Belies Extending Bivens.

Bivens' extension of damages to remedy a constitutional deprivation depends on the inadequacy of alternative remedies. *Butz v. Economou, supra,* 57 L.Ed.2d 914-915. As noted by Justice Harlan in his concurring opinion in *Bivens:*

> "[I]t is apparent that some form of damages is the only possible remedy for someone in Bevins' alleged

> position . . . assuming Bivens' innocence of the crime charged, the 'exclusionary rule' is simply irrelevant. For people in Bivens' shoes, it is damages or nothing." *Id.* 403 U.S. at 409-410.

In contrast, damages are wholly unnecessary to the vindication of petitioners' allegedly infringed rights. Petitioners complain of allegedly excessive land use controls. Declaratory and injunctive relief are at hand to remove the precise constraints of which petitioners complain if, in fact, those constraints exceed constitutional bounds. Unlike the accomplished invasion and the personal property seized, converted, and then, apparently, destroyed in *Bivens*, petitioners retain their property and the ability to utilize it in the manner they desire upon their pursuit of available and appropriate remedies—declaratory and injunctive relief.[10]

Even in *Butz v. Economou, supra*, a case in which the "damages", to the extent that they had been sustained, were irreversible, Justice Rehnquist, joined by the Chief Justice and Justices Stewart and Stevens in dissent, cogently observe that the availability of injunctive relief precludes any extension of *Bivens* relief. This case is even stronger than *Economou*, for here no irreversible "damages" exist and a complete remedy is affordable through declaratory and injunctive relief.

Sound policy considerations equally counsel that a monetary remedy not be implied in the land use/*de facto* taking context. Such considerations stem, in part, from the "chilling effect" such a remedy would cause on govern-

[10]Indeed, petitioners seek declaratory and injunctive relief by their complaint [R. 129-130].

mental officials who may find that, in formulating their land use legislation, they guessed wrong, to their financial ruin, in this difficult area of constitutional law. Of equal importance, such considerations stem from an appraisal of the proper role of the legislature and the judiciary in the conflict of balancing logical and reasoned regional values with Fifth Amendment concerns. Implying a damages remedy in the land use context places the *judiciary* rather than the legislature in the posture of determining what properties are and what properties are not in the public domain without any opportunity for the legislative body to so decide, merely because the legislative body allegedly erred in its exercise of its police powers. Uniform precedent of this Court squarely rejects such judicial intrusion into the legislative sphere; *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-388 (1926); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 4-8 (1974); and *Bivens* sanctions no such anomaly.

The availability of a meaningful alternative remedy removes the need for the implication of a monetary remedy.

C. The Lack Of Clearly Articulated Standards To Determine Where Regulation Ends And Fifth Amendment Taking Begins And The Fact That Land Use Controversies Are Traditionally State Concerns Counsel Against Extending Bivens.

In *Cort v. Ash*, 422 U.S. 66 (1975), this Court examined whether a damage remedy should be implied from 18 U.S.C. § 610 for a corporate stockholder against corporate directors. A unanimous court refused to imply such a remedy, citing *Bivens* for two pertinent principles. First, *Bivens* is

cited for the proposition that a damage remedy should *not* be implied concerning issues "traditionally relegated to state law, in an area basically the concern of the states", *Cort v. Ash, supra,* 422 U.S. at 78.

The controversy at bar is no more. This is the "land use controversy"; the area where this Court has repeatedly counseled judicial caution and restraint from undue interference with the predominately *state* legislative process. *Euclid v. Ambler Realty Co., supra,* 272 U.S. at 387-388, and *Village of Belle Terre v. Boraas, supra,* 416 U.S. at 4-8. Land use regulation, as petitioners concede in their briefs,[11] is traditionally a function of local, rather than federal, concern. Land use litigation finds its traditional forum in state, rather than federal court. Even the constitutionally dimensioned "taking issue" historically has been the subject of state court litigation. See, generally, Council on Environmental Quality, Executive Office of the President, *The Taking Issue* (Bosselman, Callies and Banta), July 9, 1973, pp. 138 and viii-xiii. As a matter "traditionally relegated to state law" no new federal damages remedy should be implied herein.

Cort relies on *Bivens* as its only authority for the principle that a federal damages remedy will be implied, as herein pertinent, only premised on a definitive federal right.

> ". . . [I]n those situations in which we have inferred a federal private cause of action not expressly provided, there has generally been a *clearly articulated federal right* in the plaintiff [citing *Bivens*] . . . ."

[11]See, e.g., pp. 19-20, Brief of Petitioners and p. 21 of petition.

> *Cort v. Ash, supra,* 422 U.S. at 82 [emphasis supplied].[12]

Can it be said that a clearly articulated constitutional right exists for these petitioners? We think not. Motions to dismiss were granted herein by the District Court. Such supposedly "clearly articulated constitutional right" was affirmed to be *nonexistent* by the Court of Appeals. To be sure, the Fifth and Fourteenth Amendments speak clearly of deprivation of property without due process of law. Putting any flesh on those bare words in the land use context has proved a continuing source of consternation to this Court—indeed to all courts.

Over 50 years ago this Court expressed mystification at the demarcation line between the end of legitimate land use police power prerogatives and the commencement of Fifth Amendment taking.

> "[The demarcation line] which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation." *Euclid v. Ambler Realty Co., supra,* 272 U.S. at 387.

This year the lack of a clearly articulated test separating where proper zoning regulation ends and taking begins was reiterated by this Court.

> "The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a

[12]Parallel authority is to the same effect. In the context of the immunities of individual governmental officials from § 1983 damage actions, the allegedly transgressed right must be established by "settled, indisputable law"; it must be a "clearly established constitutional right" that is transgressed. *Wood v. Strickland,* 420 U.S. 308, 321, 322 (1975); and *Procunier v. Navarette, supra,* 55 L.Ed.2d at 31. A violation of a "clearly established" constitutional right is also required to avoid the immunity of a governmental official subject to a *Bivens*-type action. *Butz v. Economou, supra,* 57 L.Ed.2d at 910.

problem of considerable difficulty . . . . [T]his Court, quite simply has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the Government, rather than remain disproportionately concentrated on a few persons . . . ." *Penn Central Transportation Co. v. City of New York, supra,* 57 L.Ed.2d at 900.[13]

Petitioners lack the "clearly articulated federal right" necessary as a precondition to implication of monetary relief under *Bivens.*

D. Extending Bivens To Constitutional Provisions Other Than The Fourth Amendment, Much Less To The Breadth Of Matters Embraced By "Due Process", Is Improvident.

This Court has not extended *Bivens* beyond the Fourth Amendment. Indeed, in numerous contexts where the imaginative could argue that this Court has implicitly extended *Bivens* to other constitutional claims, consistent disclaimers to the contrary appear.[14]

Justice Harlan, in his concurring opinion in *Bivens,* acknowledges that the implication of a private damages remedy for Fourth Amendment violations does not ineluctably lead to the same private action for other constitutional deprivations.

". . . [T]he appropriateness of money damages may vary with the nature of the personal interest asserted."

[13]See, also, *Goldblatt v. Hempstead,* 369 U.S. 590, 594 (1962).

[14]E.g., *Mt. Healthy School District v. Doyle, supra,* 429 U.S. at 277; *District of Columbia v. Carter, supra,* 409 U.S. at 432-433; *Butz v. Economou, supra,* n. 8; *Aldinger v. Howard,* 427 U.S. 1, 3 n. 3 (1976).

Bivens, supra, 403 U.S. at 409, n. 9 (concurring opinion of Justice Harlan).

Reflection on the area in which *Bivens* extends a private damages remedy suggests that such remedy is inappropriately extended elsewhere. Fourth Amendment violations have persistently posed remedial dilemmas spanning over half a century's decisions of this Court. *Weeks v. United States,* 232 U.S. 393 (1914); *Wolf v. Colorado,* 338 U.S. 25 (1949); *Mapp v. Ohio,* 367 U.S. 643 (1961); *Stone v. Powell,* 428 U.S. 465 (1976). The very group at which the Fourth Amendment directs its restraint—i.e., law enforcement officials—are, themselves, the ones most likely to perceive Fourth Amendment aims as an unwarranted frustration of justifiable conduct. *Weeks v. United States, supra.* An historically protracted definition of Fourth Amendment rights, difficulty in framing appropriate remedies, and a frustratingly uniform factual pattern of those at whom the Fourth Amendment is directed being the alleged transgressors—all of these elements—frame the historical backdrop of *Bivens.* Absent monetary relief against hostile and, presumably, knowledgeable transgressors, how was the important and judicially well-defined Fourth Amendment right to be vindicated?

No such historical remedial dilemma, no such considered hostility by common actors against the interest sought to be vindicated and no equivalent judicial definition exists for the labyrinth embraced by Fifth and Fourteenth Amendment "due process", much less for such claims in the land use context.

The Court of Appeals thought *Bivens* should extend beyond Fourth to Fifth and Fourteenth Amendment due

process claims because the rights protected by the latter . . . "are as fundamental as those protected by the Fourth Amendment" [A.P. 16]. Certainly the Court of Appeals is right. Certainly *some* rights safeguarded by the broad scope of due process are of equal importance with Fourth Amendment freedoms. But, to agree that *some* concepts which find their judicial expression under the rubric "due process" are as significant as the protected privilege vindicated in *Bivens* does not inexorably afford *Bevins* relief to every claim which by facile pleading can be converted into a due process violation.

This case is the best example of why the "significance of the number of constitutional amendments asserted" should not become a rote formula for magically extending or withholding *Bivens'* relief. The division of the Fifth Amendment in the land use context into two components, the due process *and* the just compensation condemnation clauses, is a creature of recent (and, perhaps, dubious) judicial invention. *Rainbow Valley Citrus Corp. v. Federal Crop Insurance Corp.,* 506 F.2d 467 (9th Cir. 1974), and A.P. 5 and 31. What is clearly insufficient to constitute inverse condemnation for purposes of the just compensation clause now may be (or may not be?) sufficient to allege a due process "deprivation". Where in this uncharted, and seemingly, unchartable, sea is any considered inquiry into: (i) the remedial dilemma underlying the constitutional right; (ii) the hostility to the constitutional right by the same group of transgressors; or (iii) the historically considered explicit judicial definition of the right? There is none and this case affords the basis for none.

Bivens should not be extended to this case.[15]

A recent opinion of the Fifth Circuit Court of Appeals sitting *en banc* declines to extend the *Bivens* remedy to due process claims as a class. *Davis v. Passman,* 571 F.2d 798 (5th Cir. 1978). However, the inapplicability of *Bivens* herein does not require a judicial assessment of either the due process interests meriting *Bivens* protection or whether the breadth and nature of due process claims is such that a private damages remedy therefor is improper or unmanageable.

3. THE INDIVIDUAL RESPONDENTS ARE IMMUNE FROM THIS SUIT.

Consistent with the decisions of this Court finding absolute immunity for legislative acts and corollary authority of this Court proscribing inquiry into legislative motivation, the Court of Appeals held the individual defendants absolutely immune for their legislative acts [A.P. 17-18]. Petitioners attack this holding contending that no more than a qualified immunity should be afforded the individual defendants. Petitioners have an attack without purpose. Even if merely qualified immunity were appropriate for the individual respondents, such immunity insulates them

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[15]Other distinctions, acknowledged in Justice Brennan's majority opinion in *Bivens,* affect this case. First, the lack of interference with governmental fiscal policy (*"federal* fiscal policy") in *Bivens, Id,* 403 U.S. at 396, exists herein. No funds exist to satisfy even a minute fraction of the "damages" sought herein and TRPA would literally suffer "economic abolition" upon levy of execution against its meager resources [Article VII, Compact]. Second, unlike *Bivens* we do deal with acts alleged merely to be in excess of authority rather than an act contrary to express constitutional prohibition. *Id,* 403 U.S. at 396-397. The very essence of petitioners' claim is that TRPA's zoning so exceeds the police power prerogatives delegated to TRPA by the Compact that it is *tantamount to* a *de facto* "taking".

from suit herein for lack of a clearly established constitutional right in petitioners.

A. Absolute Immunity for Legislators is Historically and Precedentially Sound.

Petitioners approach the immunity to which the individual respondents are entitled in reverse. So, because prior opinions of this Court have cited the speech and debate clause as *one* basis for affording absolute immunity to legislators, petitioners erroneously conclude that the speech and debate clause is the *only* basis for so holding. Reasoning backwards, petitioners urge that since TRPA is not Congress, the speech and debate clause cannot be utilized to afford absolute immunity to TRPA Governing Body members.

The flaws in petitioners' analysis are manifest and manifold.

Absolute immunity for legislative acts is not founded solely in the speech and debate clause. As petitioners accurately note, the speech and debate clause and accompanying parliamentary privileges are accorded by the Constitution to *Congress*. Article I, Sections 5 and 6 of the United States Constitution. No such privileges are conveyed by the Constitution to state legislative bodies or state legislators. Yet, as petitioners concede, absolute immunity is appropriate for state legislators. *Doe v. McMillan*, 412 U.S. 306 (1973) and *Tenney v. Brandhove*, 341 U.S. 367 (1951). Absolute immunity for state legislators does not square with the speech and debate clause of the United States Constitution being the fountainhead of legislative absolute immunity.

Nor can the corollary speech and debate immunities contained in state constitutions afford the basis for finding such absolute immunity for state legislators. We deal with alleged deprivations of *federal* constitutional rights. The United States Constitution does not reserve to states authority to transgress, supplant, or modify federal rights. The aim of the Fourteenth Amendment is precisely to the contrary. Petitioners' contention that states have the reserved right to afford immunities as they, in their discretion, deem mete is an assumption of monstrous proportions. A state's ability to legislate away the Bill of Rights, and immunize the monsters who might do so as they go, notwithstanding what one would think is the clear proscription to the contrary of the Fourteenth Amendment, is the scope of petitioners' assumption. Legislative immunity for state legislators has its taproots in common law, separation of powers and the proscription on inquiry into legislative motivation, not in residual state powers.[16]

In *Tenney v. Brandhove, supra,* Justice Frankfurter alludes to these state constitutional provisions as "protecting the privilege," *Id.* 341 U.S. at 375. Manifestly there is no existing absolute immunity privilege to protect if those state constitutions create the privilege. In finding absolute immunity for state legislators, Justice Frankfurter dwells on common law, tracing the privilege to sixteenth century

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[16]Were petitioners accurate in their contention that absolute immunity for state legislative acts depends on state action, these individual respondents would thereby be absolutely immune. California and Nevada state law afford such absolute immunity. §§818.2 and 818.4 California Government Code; *State of California v. Superior Court* (Veta), 12 Cal.3d 237, 244-247 (1974); *HFH, Ltd. v. Superior Court*, 15 Cal.3d 508 (1975) *cert. den.* 425 U.S. 904; 41.0307 and 41.032 N.R.S.

authority, *Id.* 341 U.S. at 372, protecting against inquiry into legislative motivation, *Id.*, 341 U.S. at 377, and the broad principle of legislative freedom, *Id.* 341 U.S. at 372-376.

The recent decisions of this Court focus on the nature of the immunity afforded by common law rather than rote citation of the speech and debate clause. *Procunier v. Navarette, supra,* 55 L.Ed.2d at 35 (dissenting opinion of Justice Stevens) and *Imbler v. Pachtman,* 424 U.S. 409, 421 (1976).

It is undoubtedly true, as petitioners suggest, that the principles underlying the speech and debate clause are part of the basis for absolute legislative immunity. The values that inhere in unfettered speech and debate are attributes of government not merely federal privileges. Open, frank, even disputatious legislative processes are not attributes of Congressional privilege, they are elements essential at all levels of government.

The common law and separation of powers principles articulated by Justice Frankfurter in *Tenney v. Brandhove, supra,* equally absolutely immunize the individual respondents for their legislative acts.

This Court has heretofore held that absolute immunity for legislative acts extends beyond state and federal legislators. *Doe v. McMillan, supra,* 412 U.S. at 324, n. 15, finds District of Columbia officials were "acting within the scope of their authority under applicable law and, as a result, were immune from suit." Accordingly, petitioners' argument that this Court has never countenanced the extension

of absolute immunity beyond state and national legislators is simply wrong.

Equally fallacious is petitioners' contention that recent decisions of this Court preclude absolute immunity for these individual defendants. *Wood v. Strickland, supra,* acknowledges that local school board members possess both legislative and executive powers. *Id.* 420 U.S. at 319. Nonetheless, the finding of qualified rather than absolute immunity is restricted to "the specific context of school discipline" an administrative, rather than legislative, function. *Id.* 420 U.S. at 322. Not only does *Wood* restrict its holding to non-legislative functions, it expressly acknowledges the continuing vitality of absolute immunity for legislators. *Id.* 420 U.S. at 317. Although *Scheuer v. Rhodes,* 416 U.S. 232 (1974), affords only a qualified immunity for executive acts, it is equally emphatic in its reiteration of absolute immunity for legislative acts. *Id.* 416 U.S. at 240. *Procunier v. Navarette, supra,* 55 L.Ed.2d at 30, reiterates the rule: "Legislators, judges and prosecutors have been held absolutely immune."

Petitioners can cite no more than cases holding that qualified immunity exists for executive acts. All of the recent authority of this Court deals with non-legislative activity. Petitioners' protestations to the contrary are simply wrong.

Equally underlying absolute immunity for legislators are basic principles of separation of powers. *Tenney v. Brandhove, supra,* 341 U.S. at 372-376; cf. dissenting opinion of Justice Rehnquist in *Doe v. McMillan, supra,* 412 U.S. at 340. Again, such concept is not properly garreted

as solely a Congressional privilege. Judicial deference to legislative enactments, an attribute of separation of powers, extends to all legislative levels. *Euclid v. Ambler Realty Co., supra; Belle Terre v. Boraas, supra,* and *Berman v. Parker,* 348 U.S. 26, 33 (1954). It is not consonant with separation of powers to evince judicial deference to legislative judgments but mulct legislators in damages should the Court disagree with the legislative judgment.

Another aspect of absolute legislative immunity noted in *Tenney* is the necessity of judicial inquiry into legislative motivation should a lesser standard of immunity exist.

> "The claim of an unworthy purpose does not destroy the [legislative] privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of the judgment against them based on a jury's speculation as to motives. The holding of this court in *Fletcher v. Peck* (US) 6 Cranch 87, 130, 3 L.Ed. 162, 176, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned."
>
> *Id.* 341 U.S. at 377.

Recent decisions of this Court are in accord.

> ". . . [I]t is not consonant with our scheme of government to inquire into the motives of legislators."
>
> *Doe v. McMillan, supra,* 412 U.S. at 340 (concurring opinion of Justice Blackmun); cf. *Wood v. Strickland, supra,* 412 U.S. at 317.

Avoiding inquiry into legislative motivation stems from the very earliest decisions of this Court. See the cases collected by Justice Brandeis for the Court in *Arizona v. California,* 283 U.S. 423, 455 (1931) and *Fletcher v. Peck, supra,* 3 L.Ed. at 176.

One simply cannot square the impropriety of inquiry into legislative motivation with petitioners' proposed standard of qualified immunity for TRPA members. Examination of motivation is a necessary inquiry to determine entitlement to the qualified privilege. See, e.g., *Wood v. Strickland, supra,* 420 U.S. at 322. How does one ascertain the "malicious intention", which is one aspect of denying qualified immunity, without express inquiry into legislative motivation?

Further, assuming the court is willing to depart from the established proscription on judicial inquiry into legislative motivation, what is to be gained? What is to be gained, undoubtedly, is testimony that there were as many separate motives underlying the legislative act as there were legislators involved. It requires incredible naivete to assume that a uniform and monolithic motive actuates any two legislators (much less, as in the case of TRPA, eleven) or to assume that a single or overriding motivation is discernible.

> "The search for legislative purpose is often elusive enough, without a requirement that primacy be ascertained. Legislation is frequently multipurposed; the removal of even a 'subordinate' purpose may shift altogether the consensus of the legislative judgment supporting the statute."
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> *McGinnis v. Royster,* 410 U.S. 263, 276-277 (1970) [citations omitted]

The absurdity of such an inquiry into legislative motivation as would be required by a holding of qualified immunity is manifest. What of the circumstance of two of the eleven legislators being actuated by malevolence while the other nine have pure motivations? Are two of the legislators to be held and the other nine escape without liability despite the objective effect of the legislation being the same? Or, are the nine to be mulcted because two of their colleagues entertained bad thoughts? Further, what of the malevolent legislator who zones a property "casino"? Is the economic windfall derived by the property owner from the advantageous zoning disregarded because a legislator had a "bad" motive? The utter folly of affording only qualified immunity to legislators and indulging in a motive witchhunt was long ago perceived by this Court as an improper judicial exercise. *Tenney v. Brandhove, supra,* and *Fletcher v. Peck, supra.* Coordinate state authority is to the same effect.

> ". . . [The] motive of the city officials in passing an ordinance is irrelevant to any inquiry concerning the reasonableness of the ordinance. . . . If the conditions justify the enactment of the ordinance, the motives prompting its enactment are of no consequence. If the conditions do not justify the enactment, the inquiry as to motive becomes useless. . . ."
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> *McCarthy v. City of Manhattan Beach*
> 41 Cal.2d 879 (1953)

Absolute immunity for the legislative acts of TRPA members is equally essential for the conduct of public business. The Compact is designed to deal with environmental and land use problems not subject to the control of either of the constituent states. *Younger v. County of El Dorado,*

supra, 5 Cal.3d at 488 and 494-495. The legislative compromises evident in the Compact and the ambivalence of the Compact goals of conservation and orderly growth [Compact, Article I], underscore the recognition of the competing interests which are entrusted to the TRPA governing body members to balance. That second guessing of those judgments would occur through litigation was inevitable.[17] Environmental preservation and land use regulation, areas in which state and local government had so utterly failed that the unusual solution of a compact was resorted to in order to strike a balance, are not areas of facile judgments and ready accord. Areas of such sharp and prolonged policy disagreement and legal difficulty [*Penn Central, supra,* 57 L.Ed.2d at 900] are particularly appropriate for absolute immunity.

Equally counseling that absolute immunity is essential for TRPA members' legislative acts is the position they occupy by virtue of the Compact. This Court is presently confronted by the states' united disclaimers of any fraternity with or economic responsibility for TRPA. This Court also examines an entity having mandatory financing of but $150,000.00, a pittance as against the $30,000,000.00 in damages sought by these Petitioners. It is not just that the joint state legislative and Congressional findings of the need for TRPA are threatened with economic abolition by an award of monetary relief in this case. The individual respondents are being pursued for doing what the Compact

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[17]Repeated attacks asserting that TRPA has erred in favor of overdevelopment at the expense of conservation are numerous. See, e.g., *League to Save Lake Tahoe v. TRPA,* 507 F.2d 517 (9th Cir. 1974) cert. den. 420 U.S. 974 and *Younger v. TRPA,* 516 F.2d 215 (9th Cir. 1975) cert. den. 423 U.S. 368.

requires: stronger legislation concerning land use and the environment, Compact, Article I; *Younger v. County of El Dorado, supra*, ns. 1, 2, 3 and 16; 115 Cong. Rec. 33068-33069. Further, it must be recognized that these individual Governing Body members stand alone.[18] Indemnification of these Governing Body members by an underfunded entity like TRPA is meaningless. The specter of monetary relief against individual legislators standing alone should afford an absolute immunity under the threat of public business literally breaking down.

The policies underlying legislative immunity do not depend on whether the legislator occupies a local, state or national position.

This Court's recent opinion in *Butz v. Economou, supra*, recognizes the futility of affording immunity based on the level of the actor rather than the type of activity. In holding that federal executive officers were entitled to no greater immunity than their state and local counterparts, this Court observed:

> ". . . [T]here should not be 'one law for Athens and another for Rome.'
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> • • •
>
> "The pressures and uncertainties facing decisionmakers in state government are little if at all different from those affecting federal officials. . . . Surely, *federal* officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do *state* officers."

[18]Cf. *Monell v. New York City Dept. of Social Services, supra*, 56 L.Ed. at 649, n. 9 (concurring opinion of Justice Powell) and 56 L.Ed. at 652 (dissenting opinion of Justice Rehnquist).

Id. at 57 L.Ed.2d at 911-912 and n. 25 [citations omitted; emphasis by the Court]. The quoted language articulates the reasons why federal executive personnel should enjoy no greater than qualified immunity as do their state counterparts. Nonetheless, the reasoning in reverse is equally applicable. No reason appears for affording absolute immunity to state and federal legislators but not *interstate* legislators. Nor can any such distinction be justified, as petitioners would have it, based upon the *gravity* of the decisions reached.[19] State and federal legislators have absolute immunity irrespective of the relative unimportance of the subject matter of legislation. They have it not because of the exalted office that they hold nor the significance of the issues with which they deal, they have it merely because they perform the legislative tasks. It is immunity precisely for those legislative tasks, unsolvable by the states singly, that is sought for these interstate legislators.

B. Qualified Immunity Insulates the Individual Defendants from Liability Herein.

While Respondents submit that absolute immunity is appropriate for legislative acts, even petitioners' contention that only qualified immunity is appropriate does not change the result in this case.

The scope of qualified immunity as articulated by this Court in *Wood v. Strickland, supra*, 420 U.S. at 322, is whether the offending governmental official knew or reasonably should have known that the action taken would violate the constitutional rights of the affected party. Both *Wood*

[19]*Gregoire v. Biddle*, 177 F.2d 579, 581 (2nd Cir. 1948) (Learned Hand, J.)

v. Strickland and subsequent decisions of this Court in the area of qualified immunity have consistently held that the constitutional right in question must be a clearly established constitutional right in order to avoid immunity. So, the majority opinion in *Wood v. Strickland* refers to violations of "settled, indisputable law" [*Id.* 420 U.S. at 321], "basic, unquestioned constitutional rights" [*Id.* at 322], and "clearly established constitutional rights" [*Id.* at 322].

Subsequently, in *Procunier v. Navarette, supra,* this Court upheld summary judgment in favor of state executive officers on the basis of qualified immunity on the grounds that the alleged constitutional right infringed was not "clearly established at the time of their challenged conduct" [*Id.* 55 L.Ed.2d at 31].

It cannot be earnestly urged that eleven lay governing body members of TRPA in 1971 knew or reasonably should have known the point at which their comprehensive land use regulation becomes a taking pursuant to the Fifth Amendment. Even the most recent decision of this Court acknowledges the difficulty in divining where regulation ends and taking begins. *Penn Central Transportation Co. v. City of New York, supra,* 57 L.Ed.2d at 900 and *Euclid v. Ambler Realty Co., supra,* 272 U.S. at 387 and see, generally, the discussion at pages 23-24 hereof. In *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 (1922) the demarcation line between regulation and taking was "set" at:

> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

With all deference, the "too far test" hardly illuminates. The thorny issues presented by the collision of legitimate governmental interests in the community planning and development with those secured by the Fifth Amendment to property owners cannot be minimized. The continued unsettled state of the law in this area makes it absolutely unthinkable to hold individual legislators liable for the taking of property by their authorized promulgation of a comprehensive land use measure on the premise that they knew or reasonably should have known that same might happen to transgress the Fifth Amendment right of somebody affecting a parcel of property somewhere in the Lake Tahoe Basin.

That the demarcation line between governmental regulation and taking is not a clearly established constitutional right is clear from the judicial resolution of this case below: dismissal by the district courts and affirmance by the Court of Appeals on that issue.

To suggest that eleven lay legislators must predict at their peril what the future course of constitutional law may be in this difficult area is nonsense. This Court has repeatedly reiterated that even qualified immunity does not require a governmental official to engage in the vicissitudes of predicting the future course of constitutional law. *Procunier v. Navarette, supra,* 55 L.Ed.2d at 31. Further, there is extreme "hazard of even informed prophecy as to what are 'unquestioned constitutional rights,'" *Wood v. Strickland,* 420 U.S. at 329 (dissent).

The lack of a clearly articulated right in this context precludes liability even under the rubric of qualified immunity.

4. ELEVENTH AMENDMENT IMMUNITY WAS APPROPRIATELY AFFORDED TRPA.

Relying upon this Court's decision in *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 375 (1959), and the rationale of the Eighth Circuit Court of Appeals in its opinion in *Petty* [254 F.2d 857], the Court of Appeals held TRPA immune from suit pursuant to the Eleventh Amendment [A.P. 6-9].

Petitioners attack this holding[20] on the basis that compact entities should not be afforded Eleventh Amendment immunity as a class and that, if the nature of TRPA is analyzed, Eleventh Amendment immunity should not apply to it. We submit that petitioners err on both counts. Although petitioners devote the majority of their brief to attacking the finding of Eleventh Amendment immunity, they are unable to cite any persuasive authority in which the identical result was not reached. So, with the exception of one district court opinion, Eleventh Amendment immunity has uniformly been found for compact entities. *Petty v. Tennessee-Missouri Bridge Commission, supra; Trotman v. Palisades Interstate Park Commission,* 557 F.2d 35 (2nd Cir. 1977); *Howell v. Port Authority,* 34 F.Supp. 797 (D.N.J. 1940);

[20]Although framed as an issue in the Petition for Certiorari we are not convinced that the propriety of Eleventh Amendment immunity is appropriately before the Court. Petitioners did not serve process on the states and disclaim any adversity to the states (Petitioners' Brief ns. 3 and 6). Yet, Petitioners urge that only states (and their agencies) enjoy Eleventh Amendment immunity and only a state may waive its own Eleventh Amendment immunity. It is unclear how Eleventh Amendment immunity and a sovereign's own waiver of that immunity can be here when, as Petitioners would have it, that party is not here. It is equally unclear how Petitioners can argue that the opinion below erred in finding no waiver of immunity as to TRPA, but did not err in relying on the same provision of the Compact in finding no waiver by the states.

Rao v. Port Authority, 122 F.Supp. 595 (E.D.N.Y. 1954); and the opinion of the Eighth Circuit Court of Appeal in *Petty* [254 F.2d 587].[21]

Petitioners' assertion that Eleventh Amendment immunity should be decided on a case-by-case analysis of the nature of the compact entity ignores the position that compact entities occupy. The compact clause has its genesis in the fear of an aggregation of state power threatening the Union. *Virginia v. Tennessee,* 148 U.S. 503, 519 (1893); *Dyer v. Sims,* 341 U.S. 22, 27 (1951). The means devised to deal with such potential aggregation of state power is the requirement in the compact clause of Congressional approval of proposed compacts. *Id.* By definition, compact entities sit astride two or more states and deal with matters interstate in nature. All of these considerations suggest that compact entities occupy a position of aggregate state authority warranting Eleventh Amendment immunity.

If, as petitioners suggest, compacts and their offspring are not subject to the penumbra of the states' Eleventh Amendment immunity from suit in federal court, strong disincentives are imposed upon the states from attempting to deal with problems that they share with adjacent states through the compact device. Petitioners' argument suggests that the states surrender their control upon entering into compacts. So, petitioners invoke federal court jurisdiction against the compact entity in derogation of the

[21]The only case at odds with this line of authority extending Eleventh Amendment immunity to compact entities is *Byram River v. Village of Port Chester,* 394 F.Supp. 618 (S.D.N.Y. 1975). The author of this opinion was, however, reversed on the identical issue in *Trotman, supra.*

states' Eleventh Amendment rights to adjudication in state court. If Petitioners' analysis is followed through, states have the perilous choice of either ignoring their interstate conflicts or being subjected to the panoply of federal impositions rather than familiar state rules (e.g., the Federal Administrative Procedures Act, National Environmental Policy Act, and a host of related federal laws and regulations impairing the very envisioned functioning of the compact entity). Recognition of the aggregation of state authority that compacts are, warrants Eleventh Amendment immunity.

Petitioners urge that this Court in *Petty* did not reach the question of the applicability of the Eleventh Amendment to that compact agency. The three dissenting justices in *Petty* did not so read the majority opinion. Justice Frankfurter, joined by two other justices in dissent, concurred in what they understood to be "the court's acknowledg[ment], of the applicability of the provisions of the Eleventh Amendment to Tennessee-Missouri Bridge Commission", *Id.,* 359 U.S. at 283. The concurring opinion obviously understood the "majority" opinion in *Petty* to afford such immunity to the compact entity, for the concurring justices' only reservation was that they would not reach the issue of whether such immunity appropriately extends to compact entities. The lead opinion of Justice Douglas does use the word "arguendo" before the recitation of such immunity. The remainder of the sentence reads:

> ". . . [T]his suit *must be* considered as one against the states since this bi-state corporation *is* a joint or common agency of Tennessee and Missouri."
>
> *Id.* 359 U.S. at 279 [emphasis supplied]

Stronger language can hardly be envisioned for the Court having found Eleventh Amendment immunity.

Petitioners, joined by the states (who, understandably, do not wish their treasuries put at risk), urge the traditional analysis of this compact entity as a court might construe state agencies as distinguished from political subdivisions thereof, yields the ineluctable conclusion that TRPA is insufficiently "state" to enjoy Eleventh Amendment immunity. For the reasons hereinabove set forth, we disagree that TRPA, or any other compact agency, should be examined for its indicia of "stateness" as counterbalanced by its indicia of "localness" to ascertain Eleventh Amendment immunity. Such approach has appeal because one can find case law indulging in such analysis. We submit, however, that the unique position of compact entities is such that a class exemption should be found for their Eleventh Amendment immunity. Even the weighing processes of petitioners and the states, do not, however, result in TRPA being insufficiently state for Eleventh Amendment immunity purposes.

The Court of Appeals noted that even if it were not bound to find immunity for compact entities as a class, the court "would still find immunity for the reasons set forth in the opinion of the Eighth Circuit. *Petty v. Tennessee-Missouri Bridge Commission,* 254 F.2d 857 (8th Cir. 1958)" [A.P. 8].

The Ninth Circuit thus alternatively relies on the very rationale that petitioners and the states insist is indispensable to determine the applicability of the Eleventh Amendment to TRPA. Petitioners are accurate that the

state aspects of TRPA as distinguished from the local aspects of TRPA are not articulated in the opinion. However, this Circuit Court of Appeals has repeatedly been compelled to characterize and recharacterize the nature of the Tahoe Regional Planning Compact and TRPA in a variety of different contexts.[22]

Aside from the teachings of the compact clause that only the states, with the consent of Congress may enter into a compact, this Compact contains unique reservations of state prerogatives. So, there is an express reservation of the right to alter, amend or repeal the Compact [§ 7 thereof]. Further, each state separately reserves the right to withdraw from the Compact. [Article VIII(c), Compact]. The retention of amendment and withdrawal rights in the party states evinces the joint legislative intent that the Compact is designed to be a partnership of the states rather than a matter of local governmental concern. Accordingly, it is that *state* partnership which is capable of dissolution by unilateral action of one state. No comparable authority exists with respect to states dealing with organs of local government.

---

[22]*League to Save Lake Tahoe v. TRPA, supra* (507 F.2d 517); *Younger v. TRPA,* 516 F.2d 215 (9th Cir. 1975) cert. den. 423 U.S. 868; *League to Save Lake Tahoe v. B.J.K. Corp.,* 547 F.2d 1072 (9th Cir. 1977); *California Tahoe Regional Planning Agency v. Jennings,* District of Nevada #78-1160 (presently before the Ninth Circuit); and *People of the State of California v. County of Douglas and TRPA,* United States Court of Appeals, #78-2106 (presently before the Ninth Circuit). Further, there was before the Ninth Circuit for consideration the written opinions of the Supreme Courts of the respective states characterizing the Compact and TRPA. *List v. County of Douglas, supra,* and *Younger v. County of El Dorado, supra.*

Other critical elements of the Compact evince TRPA's state rather than local nature. A majority vote of the members from each state is required for TRPA to take action [Compact, Article III(g); *Younger v. TRPA supra*]. Substantial appointment powers of board members are reserved to each state [Compact, Article III]. Although TRPA's funding is a mixture of contributions from state, local and federal government, the modest amount of optimum required funding from local government is so minimal that it appears to contemplate significant state and federal funding [Compact, Article VII]. Further, even such amount of funding as is required of local government results from state initiated action of Compact adoption. *Younger v. County of El Dorado, supra.*

Petitioners and the states make much of the fact that local government officials comprise part of TRPA's Governing Board and that certain TRPA funding is required from local government. We submit that these factors are not dispositive. The political compromises inherent in the Compact are evident from even a cursory reading thereof. The Compact essentially finds that local government and the states have failed in their land use and environmental measures affecting the region. [Compact, Article I and *Younger v. County of El Dorado, supra,* ns. 1, 2, 3 and 16]. Yet the votes controlling TRPA's Governing Body are a split between state and local representatives. The attempt to enlist a potential partnership in the interests of orderly development and resource conservation between the local representatives and statewide representatives from each state does not alter the fact that TRPA is a state imposed attempt at remedying existing governmental ineffective-

ness. The subjugation of local government regulation to TRPA's regulations [Compact, Article VI(a)] equally demonstrates that TRPA is a "higher" level of government. The Compact further vests TRPA with a mandatory review of local government's proposed public works projects [Compact, Article VI(c)]. Yet, dealing with a coordinate level of government, the states, TRPA has but advisory review over public works projects. [Compact, Article VI(d)].

The key element typically relied upon as determinative in affording Eleventh Amendment immunity is whether the treasuries of the respective states are ultimately accountable for monetary relief against the named defendant. *Trotman v. Palisades Park Commission, supra.* Under California and Nevada law, such indemnification is required by public entities on behalf of their individual officers and employees, *Williams v. Horvath,* 16 Cal.3d 834 (1976) and N.R.S. 41.035(9). The difficulty with the foregoing authority is that it is employed in favor of individuals against the specific governmental entity that they serve. In this case, that would appear to be TRPA. However, that public entity could as well be the states. It is by virtue of the Compact, which Compact was initiated by the states of Nevada and California, that TRPA Governing Body members are required to sit. Since the states require this legislative activity by virtue of their Compact, consistent with the above authority, the states should indemnify the legislators.

Neither petitioners nor the states should derive comfort from the Compact provision that, for limited purposes,

TRPA is deemed a political subdivision of *both* states [Article VI(b), Compact].[33] How TRPA's having a foot in both states makes it but a subdivision of one state is unclear. Certainly, a governmental entity partaking of two states should be afforded immunity at least equal to the immunity afforded a single state.

Petitioners and the states attempt to construe some of TRPA's functions and areas of influence as similar to functions and influences traditionally those of local, rather than state, government. Laboring under their analogy, petitioners and the states desire TRPA stripped of Eleventh Amendment immunity because *some* of its attributes are *traditionally* more local than state.

TRPA, like all compact entities, is designed to deal with specialized problems. Accordingly, its lack of powers and aspects characteristic of *both* the states *and* local government (e.g., taxation, popular election of officials, eminent domain, etc.) is not dispositive. The absence of such attributes restricts the areas within which the compact entity is to act. It does not aid in assessing whether the compact entity is state or local.

Further, the characterization of TRPA's authority as being "local" rather than "state" badly misses the mark. The environmental concerns of air and water pollution which TRPA is required to address are hardly subjects of merely local concern. See, e.g., National Environmental Policy Act, 42 USC §§ 4331 *et seq.;* the Clean Air Act, 42 USC §§ 1857 *et seq.* Even the "traditionally" local govern-

[33]The argument that this Compact provision makes TRPA a political subdivision for *all purposes* is considered *infra* at pages 52-53.

mental function of zoning and land use is no more than tradition. Similar, albeit less comprehensive, functions as the zoning authority of TRPA are performed by state government rather than local government. See, e.g., §§ 30300 *et seq.* California Public Resources Code.

The "local" and "state" labels proffered by petitioners and the states do not illuminate. No authority supports utilizing such characterizations as an *ipse dixit* formula for determining immunity. Moreover, such labels fail to recognize that changing circumstances alter the area of concern.

> ". . . [F]rom time to time what was of local concern, and therefore wisely left to local action, becomes a national concern vindicated through national regulation." Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustment*, 39 Yale L. J. 684, 724.

And, it was precisely the inability of local government and the impotence of the states acting alone to deal with Tahoe's problems which resulted in a non-local approach through TRPA. *Younger v. County of El Dorado, supra,* 5 Cal.3d at 495, n. 16.

> "The water that the Agency is to purify cannot be confined within one county or state; it circulates freely throughout Lake Tahoe. The air which the Agency must preserve from pollution knows no political boundaries. The wildlife which the Agency should protect ranges freely from one local jurisdiction to another. Nor can the population and explosive development which threaten the region be contained by any of the local authorities which govern parts of the Tahoe Basin. Only an agency transcending local boundaries can devise, adopt, and put into operation solutions for the

> problems besetting the region as a whole." *Id.*, 5 Cal. 3d at 494-495.

TRPA is far more than a local government. *Id.* and *League to Save Lake Tahoe v. TRPA,* 507 F.2d 517, 524 (9th Cir. 1974) cert. den. 420 U.S. 974.

> "The instant Compact deals with much more than mere local concerns such as zoning and land use. It addresses the environmental problems of an area not subject to the control of a single state."
>
> *Id.*

Eleventh Amendment immunity for TRPA is appropriate.

5. THE COMPACT DOES NOT WAIVE TRPA'S ELEVENTH AMENDMENT IMMUNITY

Relying upon the opinion of this Court in *Petty v. Tennessee-Missouri Bridge Commission, supra,* petitioners urge that the Compact waives TRPA's Eleventh Amendment immunity.

Petty found waiver of Eleventh Amendment immunity because the states accepted and acted upon a Congressional condition attached to its ratification of that compact authorizing federal court suit. Said condition provides:

> "That nothing herein contained shall be construed to affect, impair, or diminish any right, power, or *jurisdiction* of the United States or of any *court*, department, board, bureau, officer, or official of the United States, over or in regard to any navigable waters or any commerce between the states or with foreign countries, or any bridge, railroad, highway, pier, wharf, or other facility or improvement, or any other person,

matter, or thing, forming the subject matter of the aforesaid compact or agreement or otherwise affected by the terms thereof."

63 Stat. 930 [emphasis supplied].

Conspicuously absent from this Compact is any similar Congressional condition of approval. Indeed, the Congressional conditions of approval herein appear to be drafted in specific avoidance of the provisions held to waive Eleventh Amendment immunity in *Petty*. [See §§ 2 through 7 of Public Law 91-148, 83 Stat. 360.]

The absence of the very element relied upon in *Petty* was noted by the Court of Appeals as follows:

"The difference between *Petty* and this case is that in *Petty*, Congress attached a proviso that proved critical to the Supreme Court's determination that the states had waived immunity to suit against the bi-state corporation. The Court observed that

'[I]f there be doubt as to the meaning of the sue-and-be-sued clause in the setting of the compact prior to approval by Congress, the doubt dissipates when the condition [abrogating immunity] attached by Congress is accepted and acted upon by the two States.' 359 US at 381-82.

Discussing *Petty* in *Edelman v. Jordan, supra*, the Supreme Court emphasized that

'The question of waiver or consent under the Eleventh Amendment was found in [*Petty*] to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity.' 415 US at 672.

Appellants have pointed to no similar, express proviso attached by Congress when it approved the Compact. Thus, if there has been a waiver, it must be found in the language of the Compact itself." [A. 11-12; footnotes deleted.]

Petitioners acknowledge that waiver of Eleventh Amendment immunity will be found only where express language or overwhelming implications direct. *Edelman v. Jordan, supra,* 415 U.S. at 673. Nonetheless, and even in the face of Congressional conditions seemingly drafted to avoid the waiver effect of the consent condition in *Petty,* petitioners suggest that waiver lurks somewhere in the Compact.

At oral argument hereinbelow, petitioners urged that the use of the term "federal court" in Article VI(b) waives Eleventh Amendment immunity. That article reads:

"All ordinances, rules, regulations and policies adopted by the agency shall be enforced by the agency and by the respective states, counties, and cities. The appropriate courts of the respective states, each within its limits of territory and subject matter provided by state law, are vested with jurisdiction over civil actions to which the agency is a party and criminal actions for violations of its ordinances. Each such action shall be brought in a court of the state where the violation is committed or where the property affected by a civil action is situated, unless the action is brought in a federal court. For this purpose, the agency shall be deemed a political subdivision of both the State of California and the State of Nevada."

The location of this provision in the Compact is revealing. It is placed in the Compact article encaptioned "Agency Powers." Analysis of the eleven paragraphs of that article

reveals that that title is apt. If, indeed, the provision quoted was intended to waive Eleventh Amendment immunity, it is out of context.

That Article VI(b) deals with TRPA authority rather than waiving TRPA immunity is equally apparent from its structure. The first sentence authorizes enforcement of TRPA regulations by TRPA and all pertinent governments. The second and third sentences thereof vest state courts with jurisdiction over such actions and set venue. The paragraph concludes that "for this purpose" TRPA is deemed a subdivision of *both* states. Only after the venue provisions does the fleeting references to federal court appear.

The reference to federal court is not an obtuse waiver of Eleventh Amendment immunity. Rather, it acknowledges that *TRPA* may waive its immunity and commence the enforcement actions contemplated by Article VI(b) in federal court and that actions not subject to Eleventh Amendment immunity can be brought in federal court. *Fitzpatrick v. Bitzer, supra.*

The ambiguous "this purpose" in the last sentence of Article VI(b) most logically refers to the enforcement tenor of the Compact provision. "This purpose" modifies the state court jurisdiction and venue provisions for the enforcement actions envisioned by the Article. It is extremely important that TRPA be a political subdivision of both states for purposes of its enforcement actions, because the bond requirements ancillary to injunctions and mandate proceedings (which are the customary enforcement remedies) vary between the states. Sections 529 and

1058, California Code of Civil Procedure and Rule 65(c), Nevada Rules of Civil Procedure.

Nothing in the Compact waives TRPA's Eleventh Amendment immunity.

CONCLUSION

The controversy surrounding the Tahoe Regional Planning Compact persists. California appears to seek a *de facto* divorce or annulment (see §§ 67000 *et seq.* California Government Code creating the *California* TRPA). Both states want an amended Compact, but have not adopted remotely similar amendments (cf. Cal. Stats. 1976 c. 1329 and Nev. Stats. 1977 p. 1065). Environmentalists sue because TRPA is too generous to orderly growth. *League to Save Lake Tahoe v. TRPA, supra.* Developers, such as petitioners, sue because TRPA is too generous to the environment.

That controversy is the setting. Monetary relief should not be the answer against those who merely err in authorized legislation amid this din. Federal court should not be the forum for untangling such state-imposed dilemmas.

Dated, October 20, 1978.

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FOR ARGUMENT

Supreme Court, U. S.
FILED
NOV 29 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1327

LAKE COUNTRY ESTATES, INC., a corporation,
COUNTRY CLUB ESTATES, a partnership, and
BOULDIN DEVELOPMENT CORPORATION, a corporation,
Petitioners,

vs.

TAHOE REGIONAL PLANNING AGENCY et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

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Reply Brief for the Petitioners

I. INTRODUCTION

The issues before the Court are in essence only two questions: Whether the Tahoe Regional Planning Agency ("TRPA") is immune from suit under the Eleventh Amendment, and whether the members of TRPA's governing body ("the individual defendants") are entitled to the *absolute* legislative immunity of Congressmen and state legislators. Petitioners'[1] opening brief showed that the answer to each is no. The briefs of the respondents have not overcome that showing. Indeed, the States of California and Nevada now

1. For convenience's sake, all three petitioners will be referred to collectively as "Lake Country."

agree that TRPA does not partake of their Eleventh Amendment immunity, for it is not an arm of either state, but only a political subdivision. (See Part A below.) The individual defendants have been unable to show that their own immunity should be absolute, rather than the qualified immunity afforded other administrative officials. (See Parts B and C below.)

Trying to skirt these conclusions, TRPA and some of the individual defendants have improperly attempted to expand the scope of review beyond the immunity questions comprised in the questions presented by arguing that the Ninth Circuit erred in ruling that Lake Country has a claim for damages to assert. Respondents have filed no cross-petition, and that issue is not before the Court. (See Part D below.) Even if those arguments were properly before the Court, however, they are wrong. First, the Ninth Circuit was correct in holding a damage remedy available under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). (See Part E below.) Furthermore, Lake Country is entitled to a damage remedy under 42 U.S.C. § 1983. (See Part F below.)

The decision of the Ninth Circuit Court of Appeals should be reversed on the immunity issues presented by the petition for certiorari and the case should be remanded for proceedings against TRPA and the individual defendants on Lake Country's claims against them.

II. ARGUMENT

A. The Tahoe Regional Planning Agency Is Not Entitled to Eleventh Amendment Immunity.

Little need be said concerning TRPA's argument that it is entitled to the Eleventh Amendment immunity of California and Nevada. [Brief of Certain Respondents, pp. 40 et seq.] California and Nevada both agree with Lake Country that TRPA is not an arm of either state and does not share their immunity. [Brief for Respondent State of Nevada, pp. 3-7; Brief of Respondent State of California, pp. 517.] The states' position, while possibly not determinative, is certainly entitled to considerable weight. It is also consistent with the terms of the Compact and the applicable authorities. TRPA's contrary contention that all compact agencies have Eleventh Amendment immunity is utterly without supporting authority and, indeed, is contrary to every reported decision on the subject except the one brought here for review. Since the Eleventh Amendment issues presented by that decision have been fully dealt with in Lake Country's opening brief and its petition for certiorari, no more will be said about them here.

B. The Members of the Tahoe Regional Planning Agency's Governing Body Are Not Entitled to Absolute Immunity.

The arguments of the individual defendants in large part misconceive the issue to be decided here. No one questions that the members of TRPA's governing body are entitled to a form of official immunity. The question here is whether they are entitled to the absolute immunity of state and federal legislators. The individual defendants' arguments, rather than addressing this question, firmly and superfluously establish the need for some form of immunity for all government officials vested with discretion. Nowhere, however, do they show that the case of these appointed administrative officials presents one of "those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." *Butz v. Economou*, — U.S. —, 98 S.Ct. 2894, 2911 (1978).

The individual defendants first contend that the absolute immunity of state and federal legislators is derived from common law rather than the speech and debate clause of the

Constitution, art. I, § 6, and that the members of TRPA's governing body share that immunity because they too are "legislators." [Brief of Certain Respondents, pp. 28-30; Brief for Respondents James Henry and William Briner, pp. 6-10.] It is true that absolute legislative immunity predates the Constitution and can be traced back in the common law tradition as far as the English Bill of Rights of 1689. However, this common law immunity was codified, as it were, in the speech and debate clauses of the federal and state constitutions. *Tenney v. Brandhove,* 341 U.S. 367, 372-75 (1951). As a result, this Court has repeatedly acknowledged that "the doctrine of legislative immunity [has] . . . its roots in the Speech or Debate Clause of the Constitution. . . ." *Dombrowski v. Eastland,* 387 U.S. 82, 85 (1966); see *Scheuer v. Rhodes,* 416 U.S. 232, 240-41 (1974).[2]

The terms of the speech and debate clause, as well as those of the Bill of Rights of 1689 and those of the early state constitutions canvassed by Justice Frankfurter in *Tenney v. Brandhove,* 341 U.S. 367, 372-75 (1951), are powerful indicators of the scope of the common law privilege they embody.[3] All speak in terms of protection, not of

2. "In this country, the development of the law of immunity for public officials has been the product of constitutional provision as well as legislative and judicial processes. The Federal Constitution grants absolute immunity to Members of both Houses of the Congress with respect to any speech, debate, vote, report, or action done in session. [Citations omitted] This provision was intended to secure for the Legislative Branch of the Government the freedom from executive and judicial encroachment which had been secured in England in the Bill of Rights of 1689 and carried to the original Colonies. Immunity for the other two branches—long a creature of the common law—remained committed to the common law." [Citations and footnote omitted.]

3. TRPA and most of the individual defendants contend that the states' speech and debate clauses cannot be the source of their legislators' absolute immunity because it would be "monstrous" to permit the states to immunize their legislators from liability for deprivations of paramount federal rights. As they correctly note, however, these state constitutional provisions did not create legislative immunity but instead, like the federal constitution, only preserved a preexisting common law immunity. It is, moreover, incongruous for defendants to characterize as "monstrous" the immunization of state legislators from liability for constitutional torts on the basis of these explicit provisions of state constitutions while staunchly defending the ostensible immunization of the defendants in this case from the same liability for unconstitutional action on the basis of a flimsy and superficial analogy to state legislators' immunity.

members of any rulemaking body, but only of members of the highest such bodies—Parliament, the houses of Congress, and the houses of the state legislatures. There is no indication that the common law reflected by these constitutional provisions extended the absolute immunity of the highest lawmakers to subordinate rulemaking officials. On the contrary, the protected status of Congressmen and state legislators is unique. This Court long ago held as much when it said of the defendant Congressmen's conduct in *Kilbourn v. Thompson,* 103 U.S. 168, 201 (1881), "If they had done this in any ordinary tribunal . . . they would have been liable for the action which they had thus promoted. [¶] The House of Representatives is not an ordinary tribunal."

Even if the source of absolute legislative immunity were common law independent of the speech and debate clause, common law denies absolute protection to these defendants. As Lake Country mentioned in its opening brief, the Ninth Circuit's extension of absolute immunity to subordinate "legislative" officials in this case is in conflict with decisions in five other circuits denying them that absolute protection. [See Brief for the Petitioners, pp. 33-34.] Defendants, though perfunctorily asserting that their immunity is controlled by the common law, have failed to deal with it. In all their extended discussion of the issue they cite only one federal opinion, a district court case decided long prior to this Court's landmark decisions of the last decade, to sup-

port their claim of absolute immunity.[4] [Brief for Respondents James Henry and William Briner, p. 7.]

Defendants have also failed to show that TRPA's governing body is comparable to Congress and state legislatures in any pertinent sense. As Lake Country showed in its opening brief, for example, its members are not subject to anything like the self-disciplinary powers of those bodies and are not subject to restraint by the electorate. As this Court explained in the judicial context, *Butz v. Economou*, 98 S. Ct. at 2914, such institutional safeguards against abuse of official power are important in determining whether the private damage remedy as an alternative restraint is to be absolutely barred.

The remaining arguments the individual defendants make serve largely to prove that all government officials who are required to exercise discretion in fashioning and administering policy require some sort of immunity. Indeed their arguments show that the appropriate immunity in this case is one that is qualified, not absolute.

Defendants argue, for example, that one principle underlying absolute immunity for legislators is that of separation of powers, reflected in judicial deference to legislative judgments. [Brief of Certain Respondents, p. 31.] Similar deference, however, is extended to exercise of discretion by officials within the executive branch (see generally, 4 Davis, Administrative Law Treatise, §§ 28.04 and 28.08 (1958 and 1970 supp.)) and it is quite clear that their immunity is generally only qualified. *E.g., Butz v. Economou*, — U.S. —, 98 S. Ct. 2894 (1978); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). But more important, judicial deference to

4. Defendants Briner and Henry also quote in support, in edited fashion, the first sentence of 4 McQuillin on Municipal Corporations § 12.222 (3d Ed. 1968) holding municipal lawmakers free of liability for ordinances they enact. The remaining portion of that section makes it quite clear that the immunity described is qualified, not absolute.

decisions of the legislative and executive branches does not extend to actions that exceed their authority under the specific prohibitions of the Constitution, as alleged in this case. The federal courts have consistently reviewed and have indeed been the final authority on the constitutional validity of acts of other branches ever since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, (1803).[5] Most significant, however, the deference accorded to determinations made by subordinate "legislative" bodies such as TRPA's governing body is considerably less than that shown to those made by state legislatures. In California, for example, the Supreme Court long ago rejected a contention that a "legislative" determination of a city council was as binding on the court as that of the co-equal legislative body, stating:

> "We are not inclined to the doctrine asserted by the appellant in this case, that every subordinate body of officers to whom the legislature delegates what may be regarded as legislative power thereby becomes a part of the legislative branch of the state government, and beyond judicial control." *Spring Valley Water Works v. City and County of San Francisco*, 82 Cal. 286, 309, 22 P. 910 (1890).

It quoted with approval from *Davis v. Mayor of New York*, 1 Duer 451, 495 (Super. Ct.), affirmed in *People v. Sturtevant*, 9 N.Y. 263 (1853), saying:

5. Defendants' argument that it is inconsistent with judicial deference to legislative judgments to "mulct legislators in damages should the Court disagree with the legislative judgment" (Brief of Certain Respondents, p. 32) disregards both the constitutional limits on judicial deference and the availability of qualified immunity. Under the standards of qualified immunity laid out by this Court, subordinate "legislators" will be "mulcted in damages" only if they have not only actually violated a constitutional right but have done so maliciously or in callous disregard of established rights, not just because a court disagrees with their judgment.

> "The doctrine, [of judicial deference to legislative determinations of fact], . . . may be true when applied to the legislature of the state, which, as a co-ordinate branch of the government representing and exercising in its sphere the sovereignty of the people, is, for political reasons of manifest force, wholly exempt in all its proceedings from any legal process or judicial control; but the doctrine is not, nor is any portion of it, true when applied to a subordinate municipal body, which although clothed to some extent with legislative and even political powers, is yet, in the exercise of all its powers, just as subject to the authority and control of courts of justice, to legal process, legal restraint, and legal correction, as any other body or person, natural or artificial."

Accord: American Distilling Co. v. City Council of Sausalito, 34 Cal. 2d 660, 664, 213 P.2d 704 (1950); *San Christina Investment Co. v. City and County of San Francisco*, 167 Cal. 762, 770, 141 P. 384 (1914). For similar reasons, the members of these subordinate bodies do not share state legislators' absolute immunity from suit.[6]

Defendants' argument that absolute immunity is required because courts eschew inquiry into "legislative" motives also misses the point. [Brief of Certain Respondents, p. 32.] There is a similar restriction on inquiry into the mental state of executive officers for the purpose of invalidating their decisions, *United States v. Morgan*, 313 U.S. 409, 422 (1941), yet this court has sanctioned only a qualified immunity for the Secretary of Agriculture, the very officer involved in that case. *Butz v. Economou*, — U.S. —, 98

6. Defendants Briner's and Henry's citation of cases in which courts have refused prospectively to enjoin subordinate "legislative" acts on separation of powers grounds are inapplicable in this case, where what is sought is a remedy for completed "legislative" action. Virtually every case they cite carefully preserves the availability of a remedy after the fact.

S. Ct. 2894 (1978). It is one thing to say, as defendants' cited authorities do, that courts will avoid inquiry into legislative (or executive) motive *for the purpose of invalidating the laws enacted.* It is altogether different to say, as defendants do, that if a law violates constitutional rights, as it is alleged to do here, courts will not look to the motives of those who enacted it for the purpose of fixing liability for the harm done. As this Court has observed in limiting executive officers to a qualified immunity, an action for damages is an important means of vindicating constitutional rights that should not be thwarted by absolute immunity in the absence of compelling reasons to do so. *Butz v. Economou*, 98 S. Ct. 2894, 2910 (1978); see *Scheuer v. Rhodes*, 416 U.S. 232, 248 (1974).

Nor is it any objection that the motives of TRPA's "legislators" for their passage of an ordinance may well be diverse. [See Brief of Certain Respondents, pp. 33-34.] The same could have been said, of course, of the motives of members of the school board in *Wood v. Strickland*, 420 U.S. 308 (1975), yet this Court found a qualified immunity appropriate there. Similarly unpersuasive is the great difficulty defendants see in deciding who is to be held liable if some of them acted maliciously, for example, while others merely erred. There is no difficulty at all if those whose state of mind entitles them to qualified immunity are protected while those who acted with impermissible states of mind are not. Distinctions based on the actor's state of mind, both subjectively and objectively determined, are common ones in many fields of law. Such an individualized application of qualified immunity serves both to com-

pensate the victim and to deter abuse of official power, while at the same time fully protecting officials who act reasonably and in good faith.

Finally, defendants' general arguments about the difficulty TRPA's members face in the context of conflicting pressures concerning the future of Lake Tahoe serves only to show that they need some immunity, not that they need absolute immunity. [Brief of Certain Respondents, pp. 34-36; Brief for Respondents James Henry and William Briner, pp. 9-13.] It can scarcely be supposed that Governor Rhodes was faced with less difficult decisions or any less intense conflicting pressures when he called out the National Guard at Kent State (with considerably less time for cool reflection than these defendants have had), yet his immunity was limited to acts taken reasonably under the circumstances and in good faith. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). The same should be true here.

C. The Damage Claims Cannot Be Dismissed on the Basis of Defendants' Qualified Immunity.

Defendants also argue that the damage claims in Lake Country's complaint should be dismissed on the basis of their qualified immunity. (Brief of Certain Respondents, pp. 37-39; Brief for Respondents James Henry and William Briner, pp. 13-15.) They contend that because their action was not in violation of "clearly established constitutional rights," their qualified immunity provides a complete defense to Lake Country's damage claims.

Qualified immunity is not available as a defense if the defendant official

> "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff] affected, *or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff]*." *Wood v. Strickland*, 420 U.S. 308, 322 (1975) (emphasis supplied).

Defendants have totally ignored the portion of this formulation that conditions the availability of immunity on subjective good faith. Lake Country alleged in its complaint that defendants acted with the intention of taking its property in violation of its constitutional rights.[7] On a motion to dismiss, these allegations are taken to be true, *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-75 (1965); 2A Moore's Federal Practice § 12.08 (2d Ed. 1972), and the complaint cannot be dismissed unless it appears beyond doubt that plaintiffs can prove no set of facts in support of the claim that would entitle them to relief. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).[8] As in *Scheuer v. Rhodes*, the complaint places in issue the subjective good faith of defendants. The damage claims therefore could not be dismissed even if defendants were

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7. The complaint alleges among other things, that respondents intentionally destroyed all value and use of the property in order to take the property for public uses without instituting condemnation proceedings and without paying Lake Country just compensation for the property. TRPA is also alleged to have announced its intention to acquire Lake Country's property, and intentionally failed even to give timely or proper consideration to Lake Country's applications. [First Amended Complaint ¶¶ 23, 40; A. 9-10, 14]

8. Defendants have likewise ignored these principles applicable to a motion to dismiss by including in their version of the facts statements that amount to contentions that Lake Country has failed to exhaust administrative remedies. That apparent contention has not been passed on by either court below and there will be ample time for defendants to raise it in their answer. On the face of the complaint, however, it is not a consideration, for the complaint plainly alleges that exhaustion would be futile in these circumstances. [First Amended Complaint, ¶¶ 23, 40; A. 10, 14.]

correct in urging that no established constitutional right had been violated.[9]

Defendants are also wrong, however, in contending that they cannot be held liable because the rights Lake Country claims they violated are not clearly established. It can scarcely be said at this late date that the existence of rights of due process and just compensation guaranteed by the Fifth and Fourteenth Amendments are doubtful. If anything were unclear in this case, it would not be the existence of those rights, but only the point at which regulations in the exercise of the police power amount to violations of those rights. *Penn Central Transportation Co. v. City of New York*, — U.S. —, 98 S. Ct. 2646, 2659 (1978); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). That the exact contours of these constitutional rights have not been fixed for every case in the context of land use regulation is a far cry from saying that there is doubt about whether they exist.

This Court's decision in *Procunier v. Navarette*, 434 U.S. 555 (1978), on which respondents heavily rely, suggests nothing to the contrary. In that case summary judgment for defendants was affirmed where, at the time of the alleged violation, under pertinent decisions "there was no 'clearly established' First and Fourteenth Amendment right with respect to the correspondence of convicted prisoners in 1971-1972." 434 U.S. at 565. No decision at that time dealt with a prisoner's right under the First Amendment to send mail and the defendants therefore "could not reasonably have been expected to be aware of a constitutional right that had not been declared." 434 U.S. at 565.

It could hardly be said, however, that in this case there was any doubt that the due process and just compensation

9. Compare *Procunier v. Navarette*, 434 U.S. 555 (1978), where summary judgment for defendants was affirmed where there was no issue of intentional, but only of negligent violation of constitutional rights.

clauses of the Fifth and Fourteenth Amendments were restraints on the enactment of land use regulations at the time of the respondents' actions. Indeed, the allegations of the complaint, which are all that is now before the Court, are that all beneficial use and all economic value of Lake Country's property has been destroyed. [First Amended Complaint, ¶¶ 20, 22, 26, 27, 37, 39, 43; A. 9, 11, 13, 14, 15.] This is no doubtful case, but the clearest and most extreme case. It is apparent from this Court's prior decisions (*e.g.*, *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962); *Armstrong v. United States*, 364 U.S. 40, 48-49 (1960); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922)), that the total destruction of the usefulness and value of Lake Country's property by regulation without compensation would violate its rights to due process and just compensation.[10] The argument that the contours of due process are not exact in this case is no more valid than it was in *Wood v. Strickland*, where the same argument was advanced in dissent, 420 U.S. 308, 329 (1975) (Powell, J. dissenting), and implicitly rejected by this Court.

10. Indeed, the following portion of Justice Holmes's opinion in *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908), is strikingly apt:

> "The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings, in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. *But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.*" (Emphasis added.)

D. The Respondents Are Not Entitled to Review of the Bivens Issue.

In their opposing briefs, respondents TRPA and the individual defendants attempt to attack the Court of Appeals' ruling that Lake Country has stated a claim for damages under the Fifth Amendment within the federal question jurisdiction of the District Court. 28 U.S.C. § 1331. They argue that the Court of Appeals was wrong in applying the reasoning of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to this case.[11] [Brief of Certain Respondents, pp. 16-27; Brief for Repondents James Henry and William Briner, pp. 15-18.] This issue is not fairly comprised within the questions on which Lake Country's petition for certiorari was granted, which deal only with the immunities of the defendants. Respondents filed no cross-petition. Therefore, they are not entitled to argue this issue.

Respondents' contention does not come within the rule that they may argue any matter within the record that would sustain the judgment below. Acceptance of their arguments on the *Bivens* issue would require that judgment to be modified to dismiss the damage claims altogether, rather than remanding them to the District Court for application of the Court of Appeals' rulings on the immunity issues. The effect would not be to affirm the judgment but to enlarge respondents' rights under it. This they cannot do without cross-petitioning. *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 560, n. 11 (1976); *United States v. Reliable Transfer Co.*, 421 U.S. 397, 407, n. 2 (1975); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381, n. 4 (1970).

11. TRPA also apparently contends that the Court of Appeals affirmed the existence of a *Bivens* claim only against the individual defendants. That is clearly wrong. Since the Court had already erroneously concluded that TRPA was shielded by the Eleventh Amendment from claims of any nature, it naturally did not mention TRPA when subsequently discussing the *Bivens* claim. Nothing, however, indicates that Lake Country's damage claim is limited to the individual defendants.

This case is in exactly the same posture as *Mills v. Electric Auto-Lite Co., supra*. There the District Court had held a proxy statement misleading and applied one test of causation to determine liability. The Court of Appeals agreed that the proxy statement was misleading but reversed and remanded for application of a different test of causation. Certiorari was granted on the question of what test of causation to apply. What this Court said in refusing to consider respondent's argument that the proxy statement was not misleading is equally applicable, *mutatis mutandis*, to this case:

> "Respondents ask this Court to review the conclusions of the lower courts that the proxy statement was misleading in a material respect. Petitioners naturally did not raise this question in their petition for certiorari, and respondents filed no cross-petition. Since reversal of the Court of Appeals' ruling on this question would not dictate affirmance of that court's judgment, which remanded the case for proceedings to determine causation, but rather elimination of petitioners' rights thereunder, we will not consider the question in these circumstances. *United States v. American Ry. Exp. Co.*, 265 U.S. 425, 435 (1924); *Langnes v. Green*, 282 U.S. 531, 535-539 (1931); *Morley Constr. Co. v. Maryland Cas. Co.*, 300 U.S. 185, 191-192 (1937); R. Stern & E. Gressman, Supreme Court Practice 314, 315 (4th ed. 1969)." 396 U.S. at 381, n. 4.

For the same reason, TRPA and the individual defendants should not be heard here to question the Court of Appeals' *Bivens* ruling. As the next sections show, however, if this issue were to be considered, the Court of Appeals was correct in applying *Bivens* to afford Lake Country a damage remedy and, in addition, Lake Country has a damage remedy under 42 U.S.C. § 1983.

E. The Court of Appeals Correctly Held That Lake Country May Recover Damages If It Proves That the Tahoe Regional Planning Agency and Its Officers Deprived Lake Country of Its Property Without Due Process of Law.

1. BIVENS AUTHORIZES LAKE COUNTRY TO SUE THE TAHOE REGIONAL PLANNING AGENCY AND ITS OFFICERS FOR DAMAGES.

The Court of Appeals held that under the principles announced by this Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, supra,* an award of damages is among the remedies that will be available to Lake Country if it proves the due process claim it has stated.[12] *Jacobson v. Tahoe Regional Planning Agency,* 566 F.2d 1353, 1363-1364 (9th Cir. 1977) [A.P. 14-16]. That

12. The Court of Appeals held that Lake Country stated a claim for a taking of property without due process in violation of the Fifth and Fourteenth Amendments. It concluded that Lake Country had failed to state a cause of action under the just compensation clause of the Fifth Amendment because "TRPA was given only the power to regulate, not the power to condemn." 566 F.2d at 1358 n. 7 & 1358. [A.P. 5 n. 7 & 4-6] This reasoning denying Lake Country's claim under the just compensation clause is unsound. What triggers the application of the just compensation guarantee is a taking of private property for public use, not the initiation or consummation of condemnation proceedings. *See Jacobs v. United States,* 290 U.S. 13, 16 (1933). The Court of Appeals' approach would make a property owner's right to just compensation depend not on *whether* a taking occurred, but on *how* it was accomplished. This is not the law. *See Bydlon v. United States,* 175 F.Supp. 891, 900 (Ct.Cl. 1959). Nor should it be. An analysis that excludes from the class of takings a complete deprivation of a property interest which is accomplished *ultra vires* governmental authority allows the government to frustrate the purpose of the takings clause by recourse to a meaningless technicality.

Lake Country takes issue with both the finding that TRPA lacks condemnation authority, and the conclusion that as a result Lake Country cannot base its claim on the just compensation clause. These issues were extensively discussed by Lake Country in the briefs it filed below. Since Lake Country does not believe that the issue of the remedy available to Lake Country is properly before this Court, and does not wish to burden this Court with unnecessary briefing, that lengthy discussion is not repeated here. Should this Court decide that the issue of the remedy available to Lake Country is properly before the Court, Lake Country respectfully refers the Court to the briefs below.

decision is consistent with both the letter and the spirit of *Bivens.*[13] If this Court concludes that the respondents are entitled to challenge the Court of Appeals' ruling on this question without filing a cross-petition for certiorari, then the decision below should be affirmed.

Although the Fourth Amendment does not expressly authorize enforcement of its proscriptions by an award of damages, this Court held in *Bivens* that compensable injury to a constitutionally protected interest can be vindicated in a suit for monetary relief. 403 U.S. at 397. Recognizing that "where legal rights have been invaded . . . federal courts may use any available remedy to make good the wrong done", 403 U.S. at 396, quoting *Bell v. Hood,* 327 U.S. 678, 684 (1946) (footnote omitted), this Court found the availability of a damage remedy unsurprising. "Historically", it explained, "damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." 403 U.S. at 395.

These principles apply with equal force to the Fifth Amendment rights that the Lake Country seeks to vindicate in this action. The right not to be deprived of property without due process of law is, as the Court of Appeals concluded just as fundamental as the rights secured by the Fourth Amendment. 566 F.2d at 1363. [A.P. 16] There is no

13. Although this Court has not decided whether *Bivens* makes a damage remedy available to plaintiffs seeking redress for the deprivation of contitutional rights that are not protected by the Fourth Amendment, *see, e.g., Butz v. Economou, supra,* 98 S.Ct. at 2900 n. 8 (1978); *Mt. Healthy School District v. Doyle,* 429 U.S. 274, 277 (1977), many other federal courts have addressed that question. Like the Court of Appeals, the overwhelming majority have decided that it does. See the exhaustive compilation of cases in Lehmann, "*Bivens* and its Progeny: The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials," 4 Hast.Const. L.Q. 531, 567-568 n. 229 (1977) and *Davis v. Passman,* 571 F.2d 793, 805, 807-808 n. 6 (5th Cir. 1978) (en banc) (Goldberg, J., dissenting).

reason why Fifth Amendment rights do not deserve equally effective protection. The respondents' attempt to create a hierachy of constitutional rights, in which the due process right asserted by Lake Country is relegated to second-class status, is misguided. Although they concede that "[c]ertainly *some* rights safeguarded by the broad scope of due process are of equal importance with Fourth Amendment freedoms," [Brief of Certain Respondents 26 (emphasis in original)], the respondents suggest that Lake Country's right not to be deprived of its property without due process of law is not among them. This position cannot be justified. If any rights guaranteed by the due process clause of the Fifth Amendment are to be singled out for protection, none is more deserving than the right not to be deprived of property by governmental action without due process of law. This right was recognized long before the Constitution was written.[14] It is explicitly protected by the Constitution.[15] Its importance was reaffirmed by Congress in the Ku

14. 28 Edw. III, ch. 3 reads as follows:

> "No man of what state or condition he be, shall be put out of his lands or tenaments, nor taken, nor imprisoned, or disinherited, nor put to death, without he be brought to answer by due process of the law."

Quoted in E. Corwin, "The Doctrine of Due Process of Law Before the Civil War," 24 Harv. L. Rev. 366, 368 (1911). *Accord*, Magna Carta ¶¶ 30, 31, & 39 (1215), reprinted in American Bar Foundation, *Sources of Our Liberties* 17 (R. Perry ed. 1959). *See generally* C. McIlwin, "Due Process of Law in the Magna Carta," 14 Colum. L. Rev. 27, 51 (1914); E. Corwin, "The 'Higher Law' Background of American Constitutional Law," 42 Harv. L. Rev. 149-185, 365-409 (1928-1929).

15. U.S. Const. amends. V & XIV, § 1. "The fundamental character of the property right was asserted repeatedly on the floor of the Convention of 1787." E. Corwin, "The Basic Doctrine of American Constitutional Law," 12 Mich. L. Rev. 247, 255 (1914). See 1 *Records of the Federal Convention of 1787* 424, 533-534, 541-542 (M. Farrand ed. 1966); 2 *Records of the Federal Convention of 1787* 123 (M. Farrand ed. 1966).

Klux Klan Act of 1871,[16] as well as in the Fourteenth Amendment.[17] In addition, both this Court[18] and some of the most respected legal and political theorists in the Anglo-American tradition[19] have aptly described the right to property as the cornerstone of civilized society.

Damages are just as appropriate a remedy in a cause of action to protect Fifth Amendment rights as in one to protect Fourth Amendment rights. Compensatory relief is traditional remedy for an unreasonable government inter-

16. As this court stated in *Lynch v. Household Finance Corp.*, 405 U.S. 539 (1972),

> "[t]he rights that Congress sought to protect in the Act of 1871 were described by the chairman of the House Select Committee that drafted the legislation as 'the enjoyment of life and liberty with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety.' [citation omitted] That the protection of property as well as personal rights was intended is also confirmed by President Grant's message to Congress urging passage of the legislation, and by the remarks of many members of Congress during the legislative debates."

405 U.S. at 545-46 (footnotes omitted).

17. See *Shelley v. Kraemer*, 334 U.S. 1, 10 (1948) ("It cannot be doubted that among the civil rights intended to be protected from the discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property.").

18. *E.g., Van Horne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (1795) (emphasis in original). There this court stated:

> "The right of acquiring and possessing property and having it protected is one of the natural, inherent and unalienable rights of man. Men have a sense of property; property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that induced them to unite in society. No man would become a member of a community in which he could not enjoy the fruits of his honest labour and industry. The preservation of property, then, is the primary object of the social compact. . . ."

2 U.S. (2 Dall.) at 310.

19. J. Locke, *Of Civil Governmeni* 82-85 (1924); 1 W. Blackstone, *Commentaries** 138-140; E. Corwin, "The Basic Doctrine of American Constitutional Law," 12 Mich. L. Rev. 247, 255 (1914).

ference with property rights. Long before *Bivens,* this Court established that the Fifth Amendment can be used as a sword as well as a shield. *See* Dellinger, "Of Rights and Remedies: The Constitution As A Sword," 85 Harv. L. Rev. 1532 (1972). In *Jacobs v. United States,* 290 U.S. 13, 16 (1933), for example, it held that the Constitution gives one whose property has been taken for public use the right to sue for damages in order to insure that the Fifth Amendment guarantee of just compensation is respected. *Accord, United States v. Klamath and Moadoc Tribes of Indians,* 304 U.S. 119, 123 (1938); *cf.* "Developments in the Law—Zoning", 91 Harv. L. Rev. 1427, 1500 (1978) ("Traditionally, compensation awards have consisted of cash transfers.")

Nor are any of the special circumstances mentioned in *Bivens* that might militate against the availability of a damage remedy present in this case. This case does not confront this Court with "a question of 'federal fiscal policy'." 403 U.S. at 396. Section 5 of Congress' consent to the Compact expressly provides: "[n]othing contained in this Act or in the Compact consented to shall in any way affect the . . . obligations, of the United States . . . ." [A.P. 79]. Nor does Lake Country ask that liability be imposed on a congressional employee merely for exceeding authority delegated to him by the Congress.[20] 403 U.S. at 396-397. Instead, Lake Country alleges that an explicit constitutional prohibition has been violated. Moreover, as in *Bivens*, there is no "explicit congressional declaration that persons injured [in the manner that the petitioners were] may not recover damages . . . but must instead be remitted to another rem-

20. The individual respondents are neither congressional employees, nor in any way comparable to Congressmen. See discussion at page 6, *supra*, and in the Brief for the Petitioners 35-38.

edy, equally effective in the view of Congress." 403 U.S. at 397.[21]

The decision in *States Marine Lines, Inc. v. Shultz,* 498 F.2d 1146 (4th Cir. 1974), which involved circumstances similar to those presented here, attests to the soundness of the conclusion that *Bivens* makes a damage remedy available to Lake Country. In *Shultz*, the Bureau of Customs had seized a portion of the plaintiff's cargo from a freighter. After protracted negotiations with the Bureau failed to obtain the release of the confiscated cargo, the plaintiff sought an order directing the Bureau either to institute forfeiture proceedings or to release the cargo. The plaintiff also requested an award of incidental and consequential damages to compensate it for the losses it had suffered as a result of the Bureau's detention of the cargo. The Bureau released the cargo shortly after the suit was filed, but the plaintiff pressed on with its claim for damages. The Fourth Circuit Court of Appeals held that the plaintiff had stated a claim under the due process clause of the Fifth Amendment. 498 F.2d at 1157. Stressing the fact that because the seizure had already occurred, "other remedies such as

21. The respondents' reliance on *Davis v. Passman,* 571 F.2d 793 (5th Cir. 1978) (en banc), one of the few decisions declining to afford *Bivens'* protection to constitutional but non-Fourth Amendment rights, is misplaced. The issue presented in *Davis* was whether a former congressional aide had a cause of action for damages under the due process clause of the Fifth Amendment against a Congressman who had fired her solely on the basis of her sex. Relying heavily on what it regarded as the clearly discernible will of Congress to deny a damage remedy, the Court concluded that she did not. *See* 571 F.2d at 797-798 & 800. This consideration, which was dispositive in *Davis,* is not present here.

Indeed, one of the purposes Congress sought to achieve by enacting 42 U.S.C. § 1983 was to insure that a damage remedy would be available to persons injured by takings of their property. *See Monell v. New York Department of Social Services,* — U.S. —, 98 S.Ct. 2016, 2034 (1978).

injunctive relief or relief in the nature of mandamus are no longer viable alternatives", the Court also held that assuming that the allegations of the complaint were true, *Bivens* would entitle the plaintiff to an award of damages. *Id.*[22] The same reasoning gives Lake Country a damage remedy here.

Finally a rule that damages are not available where private property is taken without due process of law would encourage irresponsible regulation of land use and the violation of property owners' constitutional rights. It would remove proper consideration of the costs of illegal land use regulation from the decision-making process. As one commentator has explained,

> "As long as we can restrict A's land without any cost to the rest of us, we are not likely to consider very seriously the consequences of the restriction; they fall primarily on A. But if we know that the restriction may induce A to compel the government to buy his land [or to sue for damages], then as administrators or as citizens we must ask ourselves whether the benefit to be obtained from the restriction is worth the cost. . . ."

Dunham, "From Rural Enclosure to Re-Enclosure of Urban Land," 35 N.Y.U.L.Rev. 1238, 1253-1254 (1960).

Vindicating rights violated by an illegal land use regulation is a long, difficult, and expensive process. Few property owners can afford to struggle for years against a gov-

22. The same principle applies to a taking of property in the land use regulation context. *See Lomarch Corp. v. Mayor and Common Council of City of Inglewood*, 51 N.J. 108, 237 A.2d 881 (1968); *Washington Market Enterprise, Inc. v. City of Trenton*, 68 N.J. 107, 343 A.2d 408 (1975); *Keystone Associates v. State*, 39 A.D.2d 176, 333 N.Y.S.2d 27 (1972), *aff'd* 33 N.Y.2d 848, 307 N.E.2d 254, 352 N.Y.S.2d 194 (1973); *City of Miami v. Romer*, 73 So.2d 285 (Fla. 1954).

ernmental opponent that is determined to "lease" their land for as long as possible without paying for it. It is poor policy to allow governments to enact illegal regulatory measures in order to "buy time" without paying for it. A damage remedy against government agencies and their officers to redress violations of due process rights provides a needed element of deterrence. Otherwise they would be free to disregard the limits of their authority and the constitutional rights of property owners, confident that at worst the courts would merely prune their regulations back to constitutional bounds, if their actions were tested at all.

Providing a damage remedy, on the other hand, affords regulatory agencies an incentive to respect the constitutional rights of property owners as part of the process of formulating and implementing their regulations. That not only is consonant with the fundamental nature of those rights but also insures that they will be taken into account at a time when the regulatory interest can be harmonized with them before substantial damage has been done.

2. NOTHING SUGGESTS THAT LAKE COUNTRY'S FIFTH AMENDMENT RIGHTS ARE NOT ENTITLED TO BIVENS' PROTECTION.

The respondents attack the Court of Appeals' ruling that *Bivens* gives Lake Country a damage remedy on a variety of grounds. Each challenge lacks merit.

The respondents contend that the language of the *Bivens* opinion demonstrates that *Bivens* shields only "personal" as opposed to "property" interests from unconstitutional interference. Confidently placing the Fifth Amendment rights asserted by Lake Country in the latter, supposedly disfavored category, the respondents conclude that they are not worthy of *Bivens* protection. [Brief of Certain Respondents 17-19] But as this Court explained in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972), the dis-

tinction which the respondents attempt to draw between personal interests and the interests of persons in their property is specious.

> "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal right" . . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights and property are basic civil rights has long been recognized."

405 U.S. at 552. Thus, the argument advanced by the respondents rests on a premise that has already been expressly rejected by this Court.[23]

The respondents also argue that *Bivens* does not apply to this case because Lake Country has an adequate remedy in equity. [Brief of Certain Respondents 19-21] But their contention that "*Bivens*' extension of damages to remedy

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23. The respondents' carefully edited excerpts from the language of *Bivens* and *Butz* do not suggest that the position taken by this Court in *Lynch* was a temporary aberration. This Court usually describes its holding in *Bivens* in far broader terms than the respondents. *Bivens* itself characterizes the interests it protected as "constitutional", "Fourth Amendment", or even "federally protected", rather than merely "personal" in nature. *E.g.*, 403 U.S. at 392, 397 & 408. Similarly, *Butz* described *Bivens* as holding that "compensable injury to a constitutionally protected interest could be vindicated by a suit for damages." 98 S.Ct. at 2900. *See also* 98 S.Ct. at 2910.

The respondents' effort to breathe life into the alleged distinction between personal and property rights by citing *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) and *Dandridge v. Williams*, 397 U.S. 471 (1970), fares no better. Both decisions suggest that rights specifically protected by the first ten amendments merit preferential treatment, *see* 304 U.S. at 152 n. 4 & 397 U.S. at 484, not that personal rights are preferred to property rights.

a constitutional deprivation depends on the inadequacy of alternative remedies", stands on its head the principle that equitable relief is available only when there is no adequate remedy at law. Certainly this is not what this court intended to do in *Bivens*. *See Terrace v. Thompson*, 263 U.S. 197, 214 (1923). Neither the majority nor Justice Harlan intimated that damages should be a remedy of last resort for victims of constitutional deprivations. Instead this Court repeated and applied in the constitutional context the principle that "where legal rights have been invaded . . . federal courts may use any available remedy to make good the wrong done." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, supra*, 403 U.S. at 396, quoting *Bell v. Hood, supra*, 327 U.S. at 684. *Bivens* contemplates a careful and particularized inquiry into the question of what remedy is most appropriate and most likely to be effective under the circumstances, not a rigid, *a priori* rule that one form of relief is inherently preferable to all others. *See* 403 U.S. at 396-397, 408 n. 8, & 409 n. 9; Monaghan, "Foreword: Constitutional Common Law," 89 Harv.L. Rev. 1, 24 n. 125 (1975).

Moreover, the respondents' contention that in contrast to the situation in *Bivens*, "damages are wholly unnecessary to the vindication of petitioners' allegedly infringed rights" [Brief of Certain Respondents 20], is simply wrong. Lake Country has been deprived of the opportunity to use and enjoy its property ever since the respondents took it in 1972. [A. 9-10, ¶¶ 19-22] Declaratory and injunctive relief may be available to prevent TRPA from imposing illegal constraints in the future, but those remedies will not make petitioners whole. Like Bivens, Lake Country has suffered harm because of a violation of its constitutional rights. "Injunctive or declaratory relief is useless to a person

who has already been injured." *Butz v. Economou, supra,* 98 S.Ct. at 2910 (1978). The possibility of prevention has been overtaken and foreclosed by events. An award of damages is necessary to make Lake Country whole.

The respondents' reliance on *Cort v. Ash,* 422 U.S. 66 (1975), where this Court set forth the factors to be considered in determining whether to infer a private cause of action for damages from a federal statute, is equally unavailing. [Brief of Certain Respondents 21-24] *Ash* has nothing to do with this case. It addressed the question whether a private damage remedy was implicit in a statute, not in the Constitution. Constitutional interpretation is radically different from ordinary statutory construction. Greater latitude for change and growth is required in the constitutional sphere. *See Missouri v. Holland,* 252 U.S. 416, 433 (1920) (Holmes, J.); E. Levi, *An Introduction to Legal Reasoning* 59 (1949). Moreover, as Justice Harlan stated in *Bivens,* "the judiciary has a particular responsibility to assure the vindication of constitutional interests," especially those protected by the Bill of Rights. 403 U.S. at 407 (Harlan, J., concurring).

Not only is *Ash* inapplicable, but the respondents misapply the rules that *Ash* says must be followed in a different context. The respondents argue that since the behavior which Lake Country challenges is the regulation of land use, and since this is a matter of primarily local concern, *Ash* requires that a damage remedy not be made available to them. This is precisely the kind of argument that this Court rejected in *Bivens.* 403 U.S. at 394-395. The federal constitutional limits on federal and state governmental interference with private rights in property hardly concern issues "traditionally relegated to state law, in an area basically the concern of the states." [Brief of

Certain Respondents 22, quoting *Cort v. Ash, supra* 422 U.S. at 78] On the contrary, the creation and regulation of causes of action to safeguard rights guaranteed by the constitution is not historically the province of state governments. *See* C. Pritchett, *The American Constitution* 508-511 (3rd ed. 1977). "It is hard to conceive a task more appropriate for federal courts than to protect civil rights guaranteed by the Constitution against invasion by the states." H. Friendly, *Federal Jurisdiction: A General View* 90 (1973).

The respondents' assertion that Lake Country should be denied a damage remedy because it lacks a "clearly articulated federal right" also falls wide of the mark. [Brief of Certain Respondents 22-24, quoting *Cort v. Ash, supra,* 422 U.S. at 82] Read in context, the term "clear" in the phrase quoted by the respondents means "definitely existing" rather than "easily defined." See 422 U.S. at 78. This Court's difficulty in developing a single, straightforward test for determining when property has been taken does not mean that it is uncertain whether the due process clause of the Fifth Amendment shields Lake Country's property from unreasonable government interference.[24] See discussion at pages 12-13, *supra.* If this were the test, the Fourth Amendment would not have qualified for *Bivens'* protection either. This Court has found it no easier to create a definitive standard for determining whether a search or seizure is unreasonable than it has for determining whether a government interference with a property right is unreasonable. *Compare Penn Central Transportation Co. v. City of New York, supra,* 98 S. Ct. 2646, 2659 (1978) *with Go-Bart Co. v. United States,* 282 U.S. 344, 357 (1931).

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24. Indeed, both the District Court and the Court of Appeals had no problem finding that Lake Country's complaint had stated a claim under the due process clause. [A.P. 5 & 60]

The respondents also contend that "[s]ound policy considerations" militate against the availability of a damage remedy in this context because of the "chilling effect" that it would have on governmental officials who may worry about being subjected to personal liability for inadvertent errors in interpreting consititutional law. [Brief of Certain Respondents 20-21].[25] One answer to this argument is that this concern is properly the province of the law of immunity, which would protect mere error. *See* pages 10-13, *supra*. Another answer is that the argument has nothing to do with this case. Lake Country has alleged that the individual respondents did not "guess wrong", but rather that they intentionally and arbitrarily did what they knew and should have known they had no authority to do.[26] Because of the procedural posture of this case, these allegations must be taken as true. The sound policy invoked by the respondents does not militate against discouraging public officials from engaging in willful wrongdoing. Where, as here, misbehavior is intentional, any "chilling effect" is salutary.

F. Lake Country Has a Damage Remedy Under 42 U.S.C. § 1983.

The Court of Appeals reached the question whether Lake Country has a damage remedy under *Bivens* only because it held that Lake Country could not obtain damages under 42 U.S.C. § 1983. The *Bivens* issue is not properly before this Court. But if it is considered, then the Court of Ap-

25. The respondents' suggestion that the "chilling effect" concept, which was developed in an attempt to limit government interference with constitutional rights, *see Shelton v. Tucker*, 364 U.S. 479, 487 (1960), quoting *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring), should operate here to increase the amount of that interference, is certainly a novel one.

26. See discussion at page 11 & n. 7, *supra*.

peals' disposition of Lake Country's section 1983 claim must also be reviewed, not merely to provide the context for consideration of the *Bivens* issue, but also because Lake Country would be entitled to raise section 1983 as a ground for sustaining the judgment of the Court of Appeals which granted it a damage remedy.

Section 1983 provides a damage remedy for the deprivation of constitutional rights by any "person" acting under color of state law. There is no question that the rights which Lake Country claims were violated are constitutional rights. There is also no question that the individual defendants are "persons" for the purposes of section 1983. In addition, this Court's ruling in *Monell v. New York Department of Social Services*, — U.S. —, 98 S. Ct. 2018 (1978) establishes that TRPA, as a political subdivision of California and Nevada, is also a "person" under section 1983. Finally, contrary to the conclusion of the Court of Appeals, the Compact under color of which the respondents acted is not just federal law, but state law as well.[27] Therefore, every requirement for a section 1983 claim is satisfied in this case. It follows that section 1983 would provide a basis for affirming the Court of Appeals' judgment that Lake Country has a damage remedy against these defendants even assuming that its ruling on the *Bivens* issue were wrong.

Section 1983 provides a damage remedy for the taking of Lake Country's property if it was accomplished under color of state law. (Indeed, one reason Congress enacted section 1983 was to provide a damage remedy for such taking. *Monell v. Department of Social Services of the City of New York*, *supra*, 98 S.Ct. at 2034 (1978).) *Bivens* pro-

27. This point is discussed in Brief for Petitioners at 30-31.

vides a similar remedy if the taking was accomplished under the authority of federal law. Thus, regardless of whether TRPA's actions are considered to be under color of state law or under the authority of federal law, Lake Country has a damage remedy. As TRPA and the individual defendants would have it, however, Lake Country has a damage remedy under neither section 1983 nor *Bivens*, even though their actions violated both the Fifth and Fourteenth Amendments and were done under the authority of both state law enacting the Compact and federal law giving it Congress' consent. That result is neither sensible nor just, and it must be rejected.

III. CONCLUSION

For the reasons stated above and in the Brief for the Petitioners, it is respectfully submitted that the judgment of the Court of Appeals should be reversed as to the issues raised by the questions presented and the case remanded for further proceedings.

Dated: November 29, 1978.

Respectfully submitted,

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